EMORY | LAW

Emory Law Journal

Volume 63 | Issue 4

2014

The Campaign Finance Safeguards of Federalism

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THE CAMPAIGN FINANCE SAFEGUARDS OF FEDERALISM

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ABSTRACT

This Article provides the first systematic account of the relationship between campaign finance and federalism. Federalism—a fundamental characteristic of the constitutional structure—depends for its stability on political mechanisms. States and their advocates and representatives in Congress, federal agencies, political parties, intergovernmental lobbying groups, and other political forums work together to check federal interference with state governments. Entire normative theories of federalism depend on the assumption that this system of political safeguards is working effectively in the background.

But the federalism and constitutional theory literatures lack a rigorous account of the effects of dramatic political change on pro-federalism political dynamics. Building that account is particularly timely now. Political safeguards work only if states retain significant political influence. But, as recent elections vividly demonstrate, Citizens United *has created a new class of political operators—of which Super PACs are emblematic—whose potential political influence may be limitless.*

This Article's thesis is that Super PACs have the capacity to undermine all conventional political safeguards of federalism, pushing states far enough down the hierarchy of political influence to dramatically reshape our system of government. This insight highlights the underappreciated extent to which Citizens United *may have long-term structural consequences other than its effects on democratic representation. These developments have significant normative implications for federalism theory—at a minimum, they require reexamining the common assumption, central to numerous normative claims, that national political process is a durable channel for state self-defense.*

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[*] Assistant Professor, Florida State University College of Law. I am grateful to Courtney Cahill, Allan Erbsen, Rick Hasen, Rick Hills, Sam Issacharoff, David Landau, Jake Linford, Jim Gardner, Wayne Logan, Dan Markel, Murat Mungan, Mark Seidenfeld, Mark Spottswood, Larry Solum, Franita Tolson, Alex Tsesis, Hannah Wiseman, Sam Wiseman, Ernie Young, Rebecca Zietlow, and participants in Florida State University College of Law's faculty workshop series and the Loyola Chicago Constitutional Law Colloquium for extraordinarily helpful comments and suggestions. Any errors that remain are, of course, entirely my own.

They also suggest new normative claims concerning campaign finance doctrine. If sustaining federalism is a compelling governmental interest, then federalism problems may justify new campaign spending restrictions despite the First Amendment and the reasoning of Citizens United*, which otherwise appear to preclude further reforms.*

INTRODUCTION

The 2012 election cycle, with over $6 billion in total campaign spending, was the most expensive in U.S. history.[1] Super PACs and other noncandidate, nonparty groups spent an unprecedented $1.3 billion, the vast majority of which came from a small set of "ultra-wealthy megadonors"[2]: Over sixty percent of Super PAC money was donated by 132 individuals giving at least $1 million each, and ninety-eight percent came from fewer than 2,800 donors giving at least $10,000 each.[3] The two presidential campaigns raised $394 million from donors, contributing less than $200 each—an amount that Super PACs raised from only 630 donors who each contributed at least $100,000.[4]

The advent of Super PAC politics in the wake of *Citizens United v. FEC*[5] has changed federal elections and the incentives faced by federal candidates. The explosive growth in electoral spending by Super PACs and other organizations answerable to neither candidates nor political parties—much less voters—threatens to capture and divert the policymaking apparatus to serve the agendas of megadonors, drowning out the influence of less wealthy or less disciplined constituencies. Among the displaced are those who press state-government interests in federal policymaking—the "federalism constituency" that is essential to the operation of federalism's political safeguards. Despite the longstanding consensus that political safeguards exist and are important stabilizers of the constitutional structure, the interactions of campaign finance with federalism have gone almost completely unexamined.

This Article provides the first systematic account of those interactions and explores the implications of *Citizens United*—particularly the growing power of Super PACs and similar independent campaign spending groups—for federalism's political safeguards. Different models of political federalism

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[1] *2012 Election Spending Will Reach $6 Billion, Center for Responsive Politics Predicts*, OPENSECRETS.ORG (Oct. 31, 2012, 2:33 PM), http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html [hereinafter *2012 Election Spending*].

[2] Brian Imus, *Distorted Democracy: Big Money and Dark Money in the 2012 Elections*, ILL. PIRG (Nov. 2, 2012), http://www.illinoispirg.org/news/ilp/distorted-democracy-big-money-and-dark-money-2012-elections.

[3] *See* Blair Bowie & Adam Lioz, *Distorted Democracy: Post-Election Spending Analysis*, U.S. PIRG (Nov. 12, 2012), http://www.uspirg.org/sites/pirg/files/reports/post%20election%20megaphones%20FINAL.pdf (reporting outside-group spending at $1.28 billion in 2012); *see also* Imus, *supra* note 2 (presenting analysis of pre-election campaign spending data, showing very similar results as the post-election analysis of Bowie and Lioz); *2012 Election Spending*, *supra* note 1.

[4] *See* Imus, *supra* note 2.

[5] 558 U.S. 310 (2010).

emphasize the importance of different segments of the federalism constituency; but unregulated electoral spending by independent entities swamps that constituency's influence *in general* and thus undermines nearly every form of political safeguard for federalism proposed in the literature. Diminishing the effectiveness of political safeguards, in turn, shifts the burden of sustaining federalism to a judiciary with demonstrably limited capacity to implement structural constitutional norms. These effects require reworking positive and normative federalism theories and, if federalism's value is significant enough, revising federalism or campaign finance doctrine to counteract the consequences of *Citizens United*.

Citizens United sparked serious criticism[6] and rekindled debates about elections and democracy in general;[7] subsequent extension of the Court's reasoning to license unlimited fundraising and spending by outside groups like Super PACs added fuel to the controversy.[8] The "firewall" separating Super PACs from candidates and parties is porous at best; thus, "in practice a [Super PAC] is part of the campaign of the candidate it is aiding," and their expenditures are "for all practical purposes contributions to the candidates" for which outside benefactors likely expect something in return.[9] Other changes in

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[6] *See, e.g.*, Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30; Richard Posner, *Unlimited Campaign Spending—A Good Thing?*, BECKER–POSNER BLOG (Apr. 8, 2012, 9:30 PM), http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spendinga-good-thing-posner.html. President Obama famously criticized the decision in the State of the Union address with the Justices looking on. *See* 156 CONG. REC. H414, H418 (daily ed. Jan. 27, 2010) (statement of President Barack Obama).

[7] *Citizens United* has been the focus of conferences held at the University of Virginia School of Law, Cornell Law School, and Georgetown University Law Center, among others. *See* Symposium, Citizens United v. Federal Election Commission*: Implications for the American Electoral Process*, 20 CORNELL J.L. & PUB. POL'Y 643 (2011); Caperton v. Massey Coal *and* Citizens United *("Hillary: The Movie"): What Effect Will Two Leading Supreme Court Cases Have on State Courts?*, GEO. L. (Jan. 26, 2010), http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=1008 (reproducing digital recordings of the joint Aspen Institute–Georgetown Law symposium on *Caperton* and *Citizens United*); *Law School Symposium to Examine Controversial Supreme Court Campaign Finance Ruling* Citizens United, U. VA. SCH. L. (Mar. 4, 2011), http://www.law.virginia.edu/html/news/2011_spr/lawandpolitics.htm.

[8] *See* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1682–93 (2012) (canvassing critiques).

[9] *See* Briffault, *supra* note 8, at 1685. "Firewall" in this context has been used metaphorically in the media to describe the obstacles to candidate or party cooperation with Super PACs. *See, e.g.*, Jake Sherman, John Bresnahan & Kenneth P. Vogel, *A Super PAC–Politician Firewall? Not Quite*, POLITICO (Aug. 23, 2012, 4:35 AM), http://www.politico.com/news/stories/0812/79854.html. But it also refers to FEC-approved measures that

> prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee.

campaign finance law redirect donations from political parties to these groups, circumventing the parties' moderating effect that might otherwise temper megadonor demands.[10]

The ramifications for democracy are significant. The results in 2012 appear comforting—the largest Super PACs lost two-thirds of the races they funded;[11] and while the majority of outside spending was directed against Democratic candidates, President Obama was reelected and a number of Democratic Senate and House nominees won, despite large Super PAC outlays on behalf of their opponents.[12] But it is a mistake to conclude that *Citizens United* and its progeny have been proved insignificant.[13] Megadonors appear undeterred and say they'll spend *more* on the next election.[14] And there are subtler but potentially more significant effects to assess: Increased outside spending exacerbates the "polarizing, attack orientation of contemporary political advertising"[15] and heightens the potential capture of officials by interest groups—long the central concern of campaign finance regulation.[16] Elected officials have different incentives now: If they say the right things and vote the right way, they gain access to a new *unlimited* mountain of campaign money; but if they act against outside-group interests, they face the prospect of that mountain supporting a challenger. This dramatically increases the influence of

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11 C.F.R. § 109.21(h)(1) (2012).

[10] *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1714 (1999) (noting that the influence of large donors giving through normal channels "is profoundly qualified by the give and take of candidates who must stake out positions across a variety of issues and by political parties that have strong institutional interests in hewing to a middle course"); *see also* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 42–44 (2012).

[11] *See* Anupama Narayanswamy, *More Than Two-Thirds of Outside Spending Backed Losing Candidates*, SUNLIGHT FOUND. (Nov. 7, 2012, 3:54 PM), http://reporting.sunlightfoundation.com/2012/Return-on-investment-story/.

[12] *See* Michael Beckel & Russ Choma, *Super PACs, Nonprofits Favored Romney over Obama*, CENTER FOR PUB. INTEGRITY (Oct. 30, 2012, 10:02 PM), http://www.publicintegrity.org/2012/10/29/11630/super-pacs-nonprofits-favored-romney-over-obama (revealing that Republican-leaning Super PACs more than doubled Democratic-leaning groups' spending in 2012—and, in the presidential election in particular, the former more than tripled the latter's spending); David Weigel, *Take the Money and Lose: Why Did Republican Super PACs Waste So Many Millions on Bad TV?*, SLATE (Nov. 7, 2012, 7:10 PM), http://www.slate.com/articles/news_and_politics/politics/2012/11/gop_super_pacs_republican_donors_spent_millions_on_tv_ads_and_got_almost.html ("[N]ever has so much money been spent for so little gain.").

[13] *See, e.g.*, Richard L. Hasen, *Big Money Lost, but Don't Be Relieved*, CNN (Nov. 9, 2012, 2:32 PM), http://www.cnn.com/2012/11/09/opinion/hasen-outside-political-money/index.html.

[14] *See, e.g.*, Alicia Mundy, *Adelson to Keep Betting on the GOP*, WALL ST. J., Dec. 5, 2012, at A1.

[15] Issacharoff & Karlan, *supra* note 10, at 1714–15.

[16] *See* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 127–30 (2010) (characterizing campaign finance as a means of capture, also referred to as "clientelism").

large donors over federal officials' agendas.[17] Even candidates who oppose Super PACs and outside spending have to rely on them to stay competitive.[18] These dynamics also threaten democratic participation by expanding the perception that wealthy interests control the government[19] and by decreasing candidates' incentives to cultivate broader bases of smaller donors.[20]

Unexamined so far, however, are the effects of Super PAC politics—and, indeed, of modern campaign finance law generally—on federalism.[21] Federalism and campaign finance seem unrelated at first blush—the structure of government presumably does not change from election to election. A central thesis of this Article, however, is that they are connected in important ways. First, *Citizens United* and its progeny have changed the structure of American politics in ways that have serious implications for federalism's political safeguards. Second, damage to these safeguards may undermine federalism's democracy-enhancing benefits—expanded opportunities for civic participation, enhanced accountability, responsiveness, etc.—that might otherwise compensate for expanded interest-group influence.[22] Shoring up the system of political federalism against these threats might form part of a systemic solution to the broader problems *Citizens United* creates for democracy.

One core thesis common to political safeguards theories is that judicial efforts to protect federalism have been ineffectual[23] and that state governments

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[17] *See* Briffault, *supra* note 8, at 1692; Hasen, *supra* note 13.

[18] *See* Nicholas Confessore, *Result Won't Limit Campaign Money Any More Than Ruling Did*, N.Y. TIMES, Nov. 12, 2012, at A21.

[19] *See* McConnell v. FEC, 540 U.S. 93, 144 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); *see also* BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 2–3 (2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/SuperPACs_Corruption_Democracy.pdf (noting that "[t]wo in three Americans . . . trust government less because big donors to Super PACs have more influence than regular voters"); Liz Kennedy, *Citizens* Actually *United: The Overwhelming, Bipartisan Opposition to Corporate Political Spending and Support for Achievable Reforms* 1–2, DĒMOS (Oct. 25, 2012), http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf (noting that eight in ten Americans think the wealthy "drown[] out the voices of average Americans" in politics).

[20] *See* Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1263, 1291–92 (2012).

[21] *Cf.* Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 980 (2002) (examining the effects of political nationalization on party safeguards). Scholars occasionally mention the connection between campaign finance and federalism in passing. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 116 (2001) (noting without explanation that "[a]lteration of the ways election campaigns are financed likewise might alter the nature and role of the parties" within the context of the political safeguards of federalism).

[22] *See infra* notes 60–68 and accompanying text.

[23] *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 16–22 (2004) (explaining that, to the extent judicial efforts balance hard and soft doctrines, they have been suboptimal).

nevertheless remain viable components of the constitutional system.[24] Therefore, some nonjudicial mechanism(s) must have helped preserve the states' viability.[25] While most scholars agree that there are such mechanisms, there is significant debate about their nature.[26] Some cite the incentives generated by states' roles in constituting the federal government and the subnational constituencies to which most federal officials are answerable;[27] others emphasize political parties,[28] intergovernmental lobbying,[29] or state collaboration in federal administrative processes;[30] and yet others point to inertia in federal institutions[31] or other mechanisms.[32] We can usefully distinguish *ex ante* safeguards that provide incentives for federal officials to consider state interests *before* acting from *ex post* safeguards that provide states with influence over the implementation of federal programs.[33] The former seem more important than the latter because they empower states to shape federal policy from the outset and because they are the more-accepted backstops for judicial review.[34] These mechanisms interact in complex ways;[35]

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[24] *Cf.* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 218–19 (2000) ("[T]he new politics . . . [has] preserved the states' voice in national councils by linking the political fortunes of state and federal officials through their mutual dependence on decentralized political parties.").

[25] *See. id.* (noting that despite academic disagreement about the mechanics, there remains "the nagging sense so many people share that [the idea of political safeguards] captures something real, that there *are* 'political safeguards of federalism' that reduce or eliminate the need for judicial oversight of Congress on behalf of states").

[26] Some debate the relative importance of judicial and nonjudicial safeguards. *Compare, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547–52 (1954) (giving a seminal account of federalism's "political safeguards"), *with* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1390–95 (2001) (arguing that both political and judicial safeguards are necessary to sustain federalism).

[27] *See* Wechsler, *supra* note 26, at 546.

[28] *See* Kramer, *supra* note 24, at 224, 233–34.

[29] *See generally* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING (2009).

[30] *See, e.g.*, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1307 (2009); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1949 (2008); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 19 (2010).

[31] *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001).

[32] *See infra* notes 128–32 and accompanying text.

[33] *Compare, e.g.*, Kramer, *supra* note 24, at 256–65 (discussing the states' influence in major political parties as an *ex ante* safeguard), *with* Gerken, *supra* note 30, at 37–44 (discussing the relationship between federal and state governments as an *ex post* safeguard).

[34] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 & n.11 (1985).

[35] *See* JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 95–131 (2009) (arguing that federalism is best characterized as a complex system that includes multiple, overlapping safeguards); Jenna

and while complexity increases the system's durability, it is also a liability if disruption of one component disproportionately affects others or the system as a whole.[36] Even if we cannot identify the "correct" safeguards or distinguish the candidate mechanisms by importance, we can assess the implications of significant political shifts for the *system*.

Super PAC politics may undermine each of these political safeguards. Drawing on constitutional theory, public and social choice theory, positive political theory, systems theory, and political science literatures on parties and lobbies, I argue that dramatically increasing the influence of private interests in federal elections further distances candidates from their local constituencies, damages networks of state and federal officials in political parties, swamps the influence of intergovernmental lobby groups that advocate states' institutional interests in Washington, and, by decreasing the diversity of interests to which federal policymakers are accountable, makes less onerous the very federal lawmaking process whose inertia arguably holds back the tide of federal action impacting the states. The states have proven resilient and adaptable political operators, remaining viable through various changes to the campaign finance environment, including the introduction of comprehensive federal regulation, the exploitation of issue-ad and soft-money loopholes, and subsequent reforms. But these post–*Citizens United* developments are qualitatively different and may be significant enough to outpace the states' capacity for adaptation. Past increases in private-interest-group influence—facilitated, for example, by the advent of soft money—were in part offset by party mediation and remained limited enough to require candidates to remain somewhat loyal to their

Bednar, *The Political Science of Federalism*, 7 ANN. REV. L. & SOC. SCI. 269, 279–80 (2011) (noting, for example, that "safeguards are needed for each level of government"). *See generally* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011) (describing federal–state institutional relationships as complex, negotiated, and regularly revised); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012) (noting that there are multiple, competing accounts of how political federalism works in our system); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (describing federal–state negotiations in a variety of forums as a factor sustaining federalism).

[36] On the possibility of disproportionately large or small effects of perturbations in complex political/legal systems, see ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 30 (2012), and Jenna Bednar, *Constitutional Systems Theory: A Research Agenda Motivated by Vermeule*, The System of the Constitution *and Epstein*, Design for Liberty, 48 TULSA L. REV. 325, 331 (2012) (book review) (noting that "aggregation effects can be non-linear; incremental improvements could make the whole [system] *much* better than the marginal change to the component. But it could also make it worse, perhaps much worse"). For an overview of how these ideas affect constitutional theory debates in the federalism and separation of powers context, see Garrick B. Pursley, *Properties in Constitutional Systems*, 92 N.C. L. REV. 547, 561–62, 580–83 (2014) (reviewing VERMEULE, *supra*). These theoretical moves all draw on Lorenz's seminal insight about the "butterfly effect" at the founding of chaos theory. *See* EDWARD N. LORENZ, THE ESSENCE OF CHAOS 181–84 (1993).

subnational constituencies.[37] Super PACs can fund entire campaigns themselves, circumventing the parties and eliminating the need to cultivate small donors. Elections are important moments in which voters may reward or punish officials for their approaches to federalism; but as voters' influence decreases, elections become less and less of a true federalism safeguard.[38] Already, political professionals blame Super PACs for dramatic decreases in state political party fundraising,[39] voters overwhelmingly feel disconnected from their elected representatives,[40] and lobbyists affiliated with Super PACs or their donors wield significantly enhanced leverage in Washington.[41] Even if Super PACs do not consistently oppose state interests, their unlimited financial influence means that their donors' priorities will displace those of the states, pushing state preferences down or off the federal agenda and, thus, still effectively short-circuiting the political safeguards.

A thorough account of the connections between campaign finance and federalism highlights the importance of incorporating structural considerations into campaign finance theory and doctrine; and it requires adapting federalism theory to political reality. It also supports new normative claims in both fields. Super PAC politics might justify new approaches to federalism doctrine that either reinforce damaged safeguards or introduce a more effective judicial approach. Also intriguing are the possibilities for new normative claims about campaign finance doctrine. For example, the *Citizens United* Court focused solely on the free speech implications of campaign finance regulations and rejected everything but the narrow governmental interest in precluding quid pro quo corruption—direct cash-for-votes exchanges—as a constitutionally permissible basis for spending restrictions.[42] Campaign finance scholars argue that this closes most avenues for ameliorative reforms.[43] This Article demonstrates that constitutional norms other than the First Amendment are at stake—the tension between post–*Citizens United* law and federalism norms

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[37] *See infra* Part III.A (discussing Super PACs' capacity to distort the relationship between officials and their geographic constituencies); *cf.* Overton, *supra* note 20, at 1263 (suggesting that candidates may now have an increased incentive to instead remain loyal to wealthy donors).

[38] *Cf.* Sean Nicholson-Crotty, *National Election Cycles and the Intermittent Political Safeguards of Federalism*, 38 PUBLIUS 295, 296, 300–05 (2008) (presenting evidence that political safeguards are most effective in election years).

[39] *See infra* notes 253–58 and accompanying text.

[40] *See infra* notes 363–65 and accompanying text.

[41] *See infra* notes 384–96 and accompanying text.

[42] *See* Citizens United v. FEC, 558 U.S. 310, 359–61 (2010).

[43] *See, e.g.*, Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1156–59 (2011).

suggests a new approach to campaign finance issues. The governmental interest in preserving the fundamental character of the constitutional structure,[44] combined with the conventional anticorruption rationale, provides an entirely new and untried basis for regulation that might, finally, outweigh outside groups' interests in speaking by funneling large sums of money to political campaigns.

In Part I, I canvas federalism theory, highlighting a variety of mechanisms proposed as part of the system of political safeguards, the system's vulnerabilities to disruptions of the broader political process, and, by situating the safeguards in several theoretical contexts, various normative implications of their disruption for federalism theory. In Part II, I discuss the development of modern campaign finance law both to frame *Citizens United* and subsequent actions and to highlight various senses in which campaign finance regulation and federalism have long interacted. I also explore the impact of Super PACs and other outside groups in the election cycles after *Citizens United*. In Part III, I set out the implications of these developments for the political safeguards discussed in Part I. I conclude with a brief examination of the directions that a new federalism theory incorporating a more realistic assessment of the conventional political safeguards might take and the new normative case for modifying campaign finance doctrines.

I. POLITICS IN FEDERALISM THEORY

The claim that there are political safeguards for federalism[45] is a constitutional bromide—the two levels of the federal system are meant to interact and check each other, as do the branches of the federal government.[46] Madison's "double security" for liberty included the horizontal separation of powers between federal branches and the vertical division of power "between two distinct governments"—national and state—that would interact, compete for popular support, and prevent each other from growing too powerful.[47] Even if nothing else is settled, political changes that undermine the states' capacity

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[44] *Cf.* Overton, *supra* note 20, at 1273 (proposing the governmental interest in increasing democratic participation as a new justification for campaign finance regulation).

[45] *See supra* notes 23–36 and accompanying text (canvassing political safeguards theories).

[46] *See* THE FEDERALIST NOS. 45–47, 51 (James Madison).

[47] THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

to resist federal encroachment through the mechanisms of this system undermine a basic structural mandate of the Constitution.[48]

Scholars disagree on the particulars of federalism's nonjudicial safeguards; how well they function; and the significance of their existence and effectiveness for other aspects of federalism theory, doctrine, and practice. In this Part, I survey views about the nature of the political safeguards and the normative stakes for federalism theory if they are undermined. First, keep in mind that because these safeguards often figure in more general theories of federalism, changes to political safeguards may require, among other things, new theoretical or normative accounts of the legitimacy and value of judicial intervention on federalism, the nature and content of constitutional federalism norms or judicial federalism doctrine, and the best allocation of federalism-related decisionmaking among institutions. Second, and regardless of one's normative theory of federalism, there is a natural affinity between the values of federalism—such as enhanced government responsiveness and civic participation—and the values that we draw on to structure campaign law, including democratic accountability, freedom of expression, and equal access and representation. This value resonance underscores my claim that our theory and doctrine must account for campaign law's effects on federalism.[49] Insofar as a durable federalist constitutional system fosters these democratic values, damaging federalism may be a different way that *Citizens United* and its analytical offspring damage democracy generally. The corollary is that strengthening federalism may counteract the antidemocratic effects of interest-group influence to diminish that damage. Assessing these possibilities requires understanding the political aspects of federalism and their place in constitutional theory.

A. The Normative Significance of Political Safeguards

Historically, a central premise of federalism theory was that the Constitution established separate spheres of federal and state regulatory authority and precluded the levels from interfering with each other's

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[48] *See* New York v. United States, 505 U.S. 144, 157 (1992) (noting that federalism must be enforced "even if one could prove that federalism secured no advantages to anyone").

[49] *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 75–76 (2009) (discussing the values of federalism); Overton, *supra* note 20, at 1260–64 (discussing the values of campaign finance law).

domains.[50] This view, which has come to be known as "dual federalism," leaves little room for political safeguards; its crisp conceptual categories are designed to be judicially enforceable external constraints on the political process.[51] Other theories—such as those predicated on originalist theories of constitutional interpretation—posit a similarly fixed allocation of power.[52] Federalism *does*, however, have nonjudicial aspects—federal and state officials bargain over regulatory jurisdiction throughout the federal policymaking process,[53] and dualism fails insofar as it ignores these extra-judicial processes or suggests that they have no bearing on the articulation and enforcement of federalism norms.[54] The normative import of political change for federalism theory, however, varies with one's underlying view of the relationship between federalism's political aspects and constitutional federalism *norms*.

Perhaps the Constitution requires no substantive allocation of power, but only that states play a certain role in the national political process.[55] Drastic changes that fall short of eliminating the states' prescribed political role but diminish the political process's tendency to protect federalism, on this view, either lack a judicial corrective—because politics is the exclusive permissible

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[50] *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (stating that the federal and state governments, within each of their spheres, are sovereign).

[51] *See id.* at 2–3.

[52] *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 10, 13, 15 (1987) (arguing that, according to originalism, "judges are confined to the four corners of the Constitution" as it was understood by the Founders).

[53] *See* Wechsler, *supra* note 26, at 543–44 (arguing that federal and state governments bargain over the "distribution of authority" in various extrajudicial processes); Young, *supra* note 23, at 132 (describing the "presumption against preemption" as designed to force additional congressional deliberation about the federalism impacts of preemption, and thus to give the political safeguards more chances to operate).

[54] Scholars note that dualism as an actual approach to judicial federalism doctrine was "in ruins" by the 1950s. *E.g.*, Corwin, *supra* note 50, at 17. After the New Deal, it became increasingly clear that federal and state powers were broadly concurrent in practice, such that attempting to police separate spheres of federal and state regulatory power was impractical and inconsistent with the reality of modern governance. *See* Young, *supra* note 23, at 104–07 (discussing the demise of dual federalism and arguing that courts interested in safeguarding federalism "must operate in a world of largely concurrent state and federal regulatory jurisdiction").

[55] Few maintain that political safeguards are the *exclusive* permissible safeguards for federalism. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 193–209 (1980) (advancing this view); *see also* Young, *supra* note 26, at 1367 & nn.80–81. *But see* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1459–60 (2001) (critiquing this view). The Supreme Court rejected this view. *See* United States v. Morrison, 529 U.S. 598, 614–19 (2000). The Court, contrary to Justice Souter's dissenting opinion, impliedly rejected the contention that the Constitution "remits [limitations of federal power] to politics." *See id.* at 649 (Souter, J., dissenting). Not even Wechsler held that position. *See* Wechsler, *supra* note 26, at 559.

safeguard—or provide new grounds for judicial intervention on a representation–reinforcement theory.[56] If the Constitution entrenches *no general* federalism norms,[57] then judicial review of federalism issues—aside from enforcing those few textual provisions that expressly address states—is justifiable, if at all, only on nonfederalism grounds.[58] Political change that destabilizes the structure threatens federalism's *instrumental* benefits, but on this view creates no *constitutional* justification for judicial intervention unless it violates nonfederalism norms. Federalism-oriented normative claims, on this view, must be grounded on federalism's instrumental values.[59]

"Compatibilist" federalism theories skip questions about federalism norms to propose structural innovations with various substantive goals whose benefits depend on federalism's instrumental values—benefits of regulatory pluralism, for example—and whose success depends on the stability of those values.[60] In environmental law, for example, federal–state cooperation arguably could improve pollution control, renewable energy development, and ecosystem management, among other things.[61] Others propose innovations aimed at broader objectives—enhancing rights protection, democratic accountability

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[56] *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1833–36 (2005) (defending an approach to federalism doctrine incorporating significant comparative institutional analysis as a means for courts "to reinforce rather than supplant the political branches' own institutional mechanisms for handling federalism issues," suggesting, thus, "an intermediate role for courts—not as alternative decision makers, but as collaborators who sit to ensure that the essential checks and balances within the political branches remain in place"); Young, *supra* note 23, at 164 (proposing a "Democracy and Distrust for federalism" doctrine in which courts primarily work to reinforce the operation of federalism's political and process safeguards); *cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–104 (1980) (formulating a general representation–reinforcement theory of judicial review).

[57] *See generally* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) (denying the legitimacy of inferring *general* federalism norms from the constitutional text).

[58] *Cf.* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907–10 (1994) (arguing that state "sovereignty" is an incoherent concept and that federalism-reinforcing doctrines are defensible, if at all, only on instrumental grounds that would equally support a unitary but bureaucratically decentralized national government with no sovereign subunits).

[59] *See* Garrick B. Pursley, *Federalism Compatibilists*, 89 TEX. L. REV. 1365, 1383–92 (2011) (reviewing SCHAPIRO, *supra* note 49) (canvassing Schapiro's instrumental arguments); Young, *supra* note 23, at 8 (discussing federalism's values).

[60] *See* Pursley, *supra* note 59, at 1367 (proposing "compatibilism" as a category of federalism theories that reconciles in various ways the existence of constitutional federalism norms with the realities of modern intergovernmental practice, and canvassing examples).

[61] *See, e.g.*, William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 122–26 (2005); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099 (2009). *See generally* Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 881–83, 916–40 (2011) (canvassing the literature on federal–state cooperation in environmental regulation).

and participation, etc.[62] These instrumental values depend on political safeguards: The very possibility of regulatory experimentation in laboratories of democracy or pluralistic regimes with regulations tailored to local conditions depends on preserving some independent state authority.[63] Judicial intervention has not appreciably impeded federal preemption, which threatens precisely this state regulatory autonomy;[64] thus durable federalism values seem to require, among other things, the political means for states to resist federal encroachment.[65] Political change that undermines the political safeguards, then, may undermine compatibilist normative claims that depend on federalism's instrumental values for their defensibility. It may also undermine cooperative regimes by increasing centralizing pressures or decreasing states' willingness to enforce federal mandates. The real theoretical impact depends on the values at stake.

It is worth noting that *most* federalism theories leverage these instrumental values in some sense—their existence, if not their weight, is a matter of general consensus among federalism scholars.[66] And if, as some hold, robust

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[62] *See, e.g.*, ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 4 (2008) (arguing, among other things, that "Congress should . . . be guided by the underlying values of federalism—including efficiency, participation, concern for externalities, and fostering community"); SCHAPIRO, *supra* note 49, at 6–7 (emphasizing federalism's values for promoting political pluralism and dialogue and, over time, aiding in the articulation and acceptance of fundamental rights). *See generally* Pursley, *supra* note 59, at 1383–84 (canvassing this literature).

[63] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing the states as laboratories for innovation); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (explaining that the federalist system encourages pluralism—"[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society").

[64] *See* David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 514 (2008) (noting the courts' "fluid, unconstrained approach to federal preemption"); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 530–31 (2010) (noting that judicial silence regarding preemption's constitutional "authorizing norm" has the practical effect of granting Congress plenary power to preempt state law provided that it makes clear its intent to do so); Young, *supra* note 23, at 30–32, 130–34 (noting that the five Rehnquist Court Justices most invested in the "federalist revival," beginning in the mid-1990s, failed to protect state autonomy when it came to limiting federal preemption, and arguing that federalism reasons support stronger doctrinal limits on preemption). *Cf.* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1013–14 (2002) (arguing that the presumption against preemption, essentially the only doctrinal limit on federal preemption of state law, is unevenly applied and, in some cases, may actually work against state autonomy).

[65] *See* Young, *supra* note 23, at 130–34 (emphasizing preemption's effects).

[66] *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 386–405 (1997) (examining typical federalism values); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 266 (2005) ("[C]ommentators generally offer a variety of presumed benefits [of federalism], clustering around five areas: responsive governance, governmental competition, innovation, participatory democracy, and resisting tyranny."); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 631 (2013) ("Most constitutional scholars who have written about

federalism enhances democratic accountability, responsiveness, and civic participation in our system,[67] then political change that undermines federalism may be critiqued as undermining values also central to campaign finance debates. This symmetry suggests, in other words, that the connection between the fields is deeper and perhaps more important than has been noted and that normative claims in one field might benefit from justification in terms of the other—hence, my argument that federalism's complimentary instrumental value further supports modifying campaign finance doctrine to better account for federalism considerations.

Most contemporary federalism theories advance more modest claims. We might, for example, avoid interpretive controversy by hypothesizing a simple federalism norm requiring only that there be both federal and state governments and that neither level of government may undermine the separate existence of the other.[68] This leaves power allocation issues for constitutional "construction"[69]—for federalism, an iterative, multitrack process by which constitutional permissions and prohibitions are contested, clarified, resolved, and altered in the interactions between federal and state officials in and beyond mandatory channels, including within political parties, lobbying groups, and informal negotiations.[70] Participants in construction may weigh conventional federalism values and other pragmatic considerations equally.[71] On this account, political safeguards are important, but their optimal structure is influenced by a wider variety of pragmatic factors—"administrative safeguards

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federalism in the past twenty years have acknowledged at least some extent of agreement about the now well-developed catalogue of 'values of federalism.'"); *id.* at n.230 (collecting sources).

[67] *See* Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219, 1255 (2001) (highlighting federalism's benefits for democratic participation).

[68] *See* Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 512–23 (2012).

[69] *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) (describing the concept of "constitutional construction" and distinguishing it from constitutional interpretation); Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127 (2004) (analyzing the views of members of Congress about Congress's role as a constitutional interpreter); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 103–08 (2010) (providing a thorough conceptual overview of constitutional construction as the notion is currently understood in the constitutional theory literature and distinguishing construction from interpretation).

[70] *See, e.g.*, NUGENT, *supra* note 29, at 5–8 (discussing constitutional construction in various policymaking processes); Ryan, *supra* note 35, at 4 (recognizing "intergovernmental bargaining" as a means by which power is allocated between the federal and state governments); *see also* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 55–56 (2003) (arguing that the intergovernmental lobby works as an extra-constitutional mechanism to protect the states).

[71] *See, e.g.*, WHITTINGTON, *supra* note 69, at 3–10.

of federalism,"[72] for example, may be consistent with our hypothetical simple federalism norm and justified on efficiency or institutional-capacity grounds.[73] Alternatively, the Constitution may require some exclusive federal and state powers, concurrent authority over most subjects, which some federal actions pass through the state-protective Article I legislative process, and that the levels cannot interfere significantly with each other's authority. Here, power allocation norms should be articulated and enforced primarily in the political process, which is better suited to questions of regulatory capacity in areas of concurrent authority. Judicial review is better suited to enforcing clear textual preclusions of federal or state action, maintaining a rough balance of federal and state power, or implementing the abstract noninterference norm I mentioned above—all tasks that involve fairly standard constitutional reasoning rather than the kinds of political or policy judgments for which courts are poorly suited.[74] Eroding mandatory political safeguards may, on this view, violate constitutional norms *and* destabilize the system enough to require compensating adjustments.[75]

These are summary characterizations of nuanced positions in a complex debate. Most views do, however, assume that some nonjudicial safeguards protect the system against disruptions that courts cannot or should not address. The normative significance of eroding nonjudicial safeguards varies with the relative importance assigned to judicial and political enforcement. That prioritization may be based on constitutional or comparative-institutional-

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[72] *See* Bulman-Pozen & Gerken, *supra* note 30, at 1285 & n.103 (discussing this phrase's meaning). There is some debate among scholars concerning which features or practices within federal administrative agencies—if any—actually function to safeguard state autonomy. *Compare id.* at 1285–86 (arguing that the states' roles as implementers of federal law in many federal regulatory regimes gives the states the voice to press their interests in the federal administrative process), *with* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2100–07 (2008) (maintaining that federal agencies can and should consciously consider and account for state interests in making regulatory decisions).

[73] *See generally* Pursley, *supra* note 59 (describing pragmatic justifications for various federalism doctrines); Young, *supra* note 23, at 65–122 (discussing the relevance of institutional capacity considerations to assessing nearly every type of federalism doctrine).

[74] *See* Pursley, *supra* note 68, at 512–28 (describing methods by which courts craft doctrinal rules, tests, and standards to implement broad, abstract constitutional norms like this noninterference norm); Young, *supra* note 56, at 1816–30 (discussing the institutional capacities of courts to address various aspects of federalism controversies); *id.* at 1837–38 (noting that "clear text" provides straightforward legal reasons of the kind courts are accustomed to relying upon); *id.* at 1840–44 (arguing that courts are competent to make "compensating adjustments" to maintain a rough balance of state and federal power).

[75] *See, e.g.*, Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2117, 2134 (2008) (arguing that Article I process is "nonoptional"); Young, *supra* note 56, at 1748–60 (defending compensating adjustments).

capacity considerations.[76] If the division of labor is constitutionally mandatory, then damaging the political safeguards directly undermines the federalism norms themselves or the handling of federalism issues assigned to political institutions. If political safeguards are primary for instrumental reasons, their erosion may justify expanding judicial intervention to compensate. If courts lack capacity, then we have new reasons to reinvigorate political safeguards legislatively or with different campaign finance doctrine. If judicial review is primary, then we might similarly cite process failures to justify more or different judicial intervention. If judicial enforcement is inherently ineffective for some federalism disputes, eroding nonjudicial mechanisms will increase nonremediable violations and, thus, threaten federalism's instrumental benefits.

Aside from enforcing norms, nonjudicial safeguards also may provide important forums for constitutional construction.[77] Construction generates quasi-constitutional norms that are relatively binding on repeat players—similar to congressional precedents but with varying binding force.[78] On some accounts of constitutionalism, nonjudicial views of constitutional meaning are significant in themselves;[79] and in any event, on a thin-norm federalism theory—or a theory in which state authority is largely concurrent with federal authority—these constructive norms guide actors where the Constitution itself does not, and thus have tremendous practical significance.[80] For federalism, this naturally suggests that state officials should have a role in deciding power allocation issues that are subject to construction. If states are *excluded*, the system loses their expertise and perspective as well as the legitimizing value of their participation in negotiating these quasi-constitutional federalism norms.[81]

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[76] *Compare* CHOPER, *supra* note 55, at 193–209, *with* Young, *supra* note 56, at 1816–20 (discussing the need for comparative institutional analysis).

[77] *See* sources cited *supra* note 69.

[78] *Cf.* Michael J. Gerhardt, *Non-judicial Precedent*, 61 VAND. L. REV. 713 (2008) (assessing the theoretical and practical significance of legislative practice precedents). *See generally* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008) (describing congressional practice norms as "soft law," examining their legal status and effects, and arguing that such norms take on constitutional character in some circumstances); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007) (arguing that "ordinary" statutes that discharge constitutional *functions* should be considered part of our constitutional law).

[79] *See, e.g.*, Peabody & Nugent, *supra* note 70, at 54 (noting that "the intergovernmental lobby" helps define "spheres of state and federal authority").

[80] *See* NUGENT, *supra* note 29, at 6–8.

[81] *See* Ryan, *supra* note 35, at 5–7 ("[B]argaining enables a partnership of state and federal actors to interpret constitutional directives . . . across the state-federal divide.").

Judicial review has had practically no effect on the allocation of federal and state power, even at high points of judicial attention to federalism—e.g., the era of Commerce Clause formalism preceding the New Deal in which the Court enforced dual federalism religiously but with little practical impact on state power or federal expansion.[82] The Rehnquist Court's attempt at a "federalist revival," too, made little difference: bolstering state sovereign immunity and enforcing an anticommandeering principle is not much use when the actions most dangerous for state power—federal preemption and conditional spending—remain essentially unrestrained.[83] Nevertheless, state governments remain robust components of our system.[84] Nonjudicial safeguards—whatever their form—therefore must be central to explaining what has stabilized federalism for so long.[85] Threats to the political safeguards, *a fortiori*, can create serious systemic problems.

B. The Varieties of Political Safeguards

It is difficult to specify a correct allocation of federal and state power—it is contested, shifting, and largely a policy question—but the processes that sustain *some balance* are easier to identify and perhaps more important. Despite disagreement about the scope and content of constitutional federalism *norms*, most federalism scholars assume that there are nonjudicial safeguards even if they focus primarily on judicial federalism doctrine.[86] The few who have examined the matter at length identify several plausible nonjudicial safeguards.

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[82] *See* SCHAPIRO, *supra* note 49, at 40–45; Kramer, *supra* note 24, at 229–33; *see also* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yesky, 1998 SUP. CT. REV. 71, 72; Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1313–26 (1999) (arguing that judicial review is generally ineffective because federal courts' institutional environment counsels deference to the other federal branches); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 908 (2006). Systemic failure of political safeguards may create hydraulic pressure for increased judicial intervention which, given this track record, might be counterproductive.

[83] *See* Kramer, *supra* note 24, at 230–33; Smith, *supra* note 82, at 908 (noting that the Rehnquist Court "limited Congress's power to force state officials to implement federal law, but left virtually unchecked Congress's power to accomplish the same end through the use of conditioned spending" (footnote omitted)); Young, *supra* note 23, at 130–60 (discussing the significance of preemption in relation to other threats to federalism).

[84] *See* Kramer, *supra* note 24, at 227–28.

[85] *See* DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES 36–47, 60–63 (1962) (documenting historical examples disproving federalism's "demise"); *see also* JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 1–10 (2002).

[86] *See* Young, *supra* note 26, at 1367 (observing that most "defenders of a judicial role" in federalism preservation nevertheless acknowledge political safeguards).

Wechsler's seminal article highlighted two,[87] both of which have since been drawn into doubt.[88] The first was a political "mood" in which "national action" was "regarded as exceptional . . . , an intrusion to be justified by some necessity, the special rather than the ordinary case."[89] This may once have imposed special burdens on those seeking federal action, but, today, the default in many areas is an expectation of federal action.[90] Wechsler's principal focus was on the states' "crucial role in the selection and the composition of the national authority."[91] By making federal officials dependent on state governments—through state control of House electoral districts, etc.—and geographically limited subnational constituencies, the argument goes, the Constitution gives states a voice in federal policymaking sufficient to protect themselves against federal intrusion.[92] Federal lawmakers have incentives to consider state preferences because states control their political fortunes to a degree. Critics charge that this contention conflates the interests of geographically circumscribed *constituencies* with the interests of state governments *as institutions*.[93] Indeed, federal officials' incentive to maximize constituent support by delivering policy will often place them in *competition* with state institutions serving the same voters—they will opt for federal action, for which they can claim credit, even at the expense of state autonomy.[94] Things would be different if constituents valued federalism in itself, but most voters prioritize substantive policy objectives over structural matters.[95] And

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87 *See* Wechsler, *supra* note 26, at 544, 546.

88 *See generally* Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001) (criticizing the Supreme Court's reliance on political safeguards theories); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139 (1998).

89 Wechsler, *supra* note 26, at 544.

90 *See* Baker & Young, *supra* note 21, at 113; Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1506 (1994).

91 Wechsler, *supra* note 26, at 546.

92 *See id.*

93 *See* Kramer, *supra* note 24, at 221–23.

94 *See id.* at 223–24; Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 266–68 (1990) (examining the public choice theory hypothesis that federal officials will make federal–state power allocation decisions based, not on concern for federalism, but on their self-interest—thus even seemingly pro-federalism actions may be strategic: "Congress will delegate to local regulators only when the political support it obtains from deferring to the states is greater than the political support it obtains from regulating itself").

95 *See* Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 131 (2004) (noting that much of officials' rhetoric about federalism is strategically deployed to camouflage other policy goals and that "*even if* the American people were well informed about the benefits of federalism, they would still trade off those benefits in order to secure other policy objectives"); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 103 (2004) (arguing

where Congress does respond to state interests, politically powerful states—e.g., battleground states—tend to attract disproportionate attention from officials concerned with their own and their parties' long-term political goals.[96] Thus, a small minority of states can, through federal action, impose their preferences on the others—contravening state coequality norms proposed by some, rendering Wechsler's safeguard counterproductive for many states and, by fostering interstate discord, a serious threat to long-term structural stability.[97]

These criticisms reproduce the puzzle of states' continuing viability. One well-known proposed solution is Larry Kramer's argument that political parties safeguard federalism by "creat[ing] a political culture in which members of local, state, and national networks . . . work for the election of candidates at every level";[98] federal officials thus learn of and have incentives to prioritize state preferences.[99] This results from American parties' prioritizing elections over policy programs and their decentralized structures, which connect "state and local organizations" from across the nation "[with] a shared interest in the outcome of national (and especially presidential) elections."[100] Party structure

> promotes relationships and establishes obligations among officials that cut across governmental planes. . . . [T]he obligation to support party candidates [does not] end on election day, for staying in power constrains successful candidates to work with their counterparts at other levels. A member of Congress, even a President, will need to help state officials either as a matter of party fellowship or in order to shore up the willingness of state officials to offer support in the future; the same thing is true in reverse. The whole process is one of

that constituents are rationally ignorant about federalism—they invest their time in pressing for substantive policy outcomes rather than second-order structural issues—and thus are not likely to press federal representatives to protect state interests); *cf.* Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1673–74 (2007) (presenting survey evidence suggesting some constituents *do* care about federalism in itself). There are, of course, certain groups whose members care quite a bit about federalism in the abstract—some early actions of the Tea Party spring to mind. *See, e.g.*, Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 487, 510–11 (2012).

96 *Cf.* Baker & Young, *supra* note 21, at 117 (discussing "horizontal aggrandizement").

97 *Id.* at 117–18. *See generally* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008) (positing a constitutional norm of state coequality); James A. Gardner & Antoni Abad I Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 AM. J. COMP. L. 491 (2011) (emphasizing some problems associated with interstate conflicts).

98 Kramer, *supra* note 24, at 279.

99 *See id.* at 276–87; Kramer, *supra* note 90, at 1520–42.

100 Kramer, *supra* note 24, at 277–79 (footnote omitted); *accord* Kramer, *supra* note 90, at 1524.

> elaborate, if diffuse, reciprocity: of mutual dependency among party and elected officials at different levels . . . .[101]

The history of American parties suggests, moreover, that this network "has proved to be remarkably durable and effective"—and thus may be a reliable federalism safeguard.[102]

There are other views. Professor Clark argues that inertia in federal lawmaking processes is a systemic federalism safeguard.[103] The Supremacy Clause makes federal encroachment on state power possible only through the Article I legislative process,[104] which, with its bicameralism and presentment requirements and numerous "vetogates" at which minority interests can block action, is resource- and time-intensive.[105] State law is the constitutional default in our system; thus, slowing the rate of preemptive federal lawmaking preserves state regulatory authority.[106] Article I, then, establishes a set of "procedures [that] safeguard federalism."[107] Administrative law scholars propose agency-centric accounts. One argument is that federal administrative expansion is actually beneficial for federalism because agencies are better equipped—as institutions—than Congress or courts to account for state interests;[108] another is that administrative law principles are on balance better than existing judicial federalism doctrines for protecting state regulatory power.[109] Kramer argues that the many and varied cooperative federal–state regulatory regimes make federal agencies similar to political parties in fostering federal interaction with and dependence on the states, creating additional pro-federalism incentives.[110]

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101 Kramer, *supra* note 24, at 279.

102 *Id.* at 278.

103 *See generally* Clark, *supra* note 31 (arguing that the onerous federal lawmaking process safeguards federalism by limiting the volume of potentially preemptive federal law).

104 *See* U.S. CONST. art. VI, cl. 2; Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422–23 (2008).

105 *See* Clark, *supra* note 31, at 1339; William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008).

106 *See* Clark, *supra* note 31, at 1339; Young, *supra* note 23, at 89 (describing state law as the default system); *cf.* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("'[S]tart with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

107 Clark, *supra* note 31, at 1339.

108 *See* Galle & Seidenfeld, *supra* note 30, at 1966–67 (highlighting institutional obstacles to Congress fully considering state interests).

109 *See* Metzger, *supra* note 72, at 2109.

110 *See* Kramer, *supra* note 90, at 1520–29.

These updated accounts better reflect current political realities, but critics charge that Kramer ignores centralization in the parties that has diminished the influence of state officials and party committees[111] and that Clark's view incorporates no protection for states against nonlegislative federal enactments that do not face the onerous Article I process.[112] Administrative federalism advocates draw criticism from conventional theorists who remain leery of agency processes and preemptive federal regulations.[113]

A second set of arguments turn on different conceptions of the sort of state power needed for stable federalism.[114] Conventional theorists focus on state regulatory autonomy—the power to regulate on some subjects without federal interference.[115] Others, however, emphasize states' leverage in bargaining with federal officials over practical power-allocation question that are not resolved by the Constitution. Professor Ryan demonstrates that "federalism bargaining permeates American govern[ment]," including in the following:

> [F]amiliar forms of negotiation used in lawmaking (such as the Stimulus), negotiations over various kinds of law enforcement (such as immigration or pollution), negotiations under the federal spending power (such as the No Child Left Behind Act of 2001), and negotiations for exceptions under otherwise applicable laws (such as the Endangered Species Act) . . . [as well as] negotiated federal rulemaking with state stakeholders (as was used to regulate stormwater pollution), federal statutes that share policy design with states (such as Medicaid), staggered programs of iterative shared policymaking (as used to regulate auto emissions), and intersystemic signaling negotiations, by which independently operating state and federal actors trade influence over the direction of evolving interjurisdictional policies (as reflected in medical marijuana enforcement).[116]

This highlights the role of lobbying organizations representing subnational governments—the National Governors Association, National Conference of

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111 *See* Frymer & Yoon, *supra* note 21, at 980. For other criticisms, see Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Baker & Young, *supra* note 21, at 115; and Young, *supra* note 23, at 75–79.

112 *See* Young, *supra* note 23, at 89–90.

113 *See, e.g.*, Benjamin & Young, *supra* note 75, at 2113–14; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008) (maintaining that "[f]ederal administrative action is . . . threatening to state autonomy" because federal agencies can directly affect state government power or autonomy without running their decisions through something like the set of political checks that operate in Congress).

114 *See* Gerken, *supra* note 35, at 1553 (highlighting multiple forms of state power).

115 *See, e.g.*, Young, *supra* note 23, at 51–63.

116 Ryan, *supra* note 35, at 7–8.

State Legislatures, etc.—and other channels of federal–state bargaining in reinforcing federalism.[117] While these dynamics are largely overlooked in legal scholarship, political scientists view them as important functional safeguards.[118] In principle, because state officials themselves are involved, these mechanisms feature precisely the state institutional interests that are missing from Wechsler's theory,[119] and they affect both the legislative and implementation phases of the federal policy process—lobbying and negotiation occur in Congress and in federal agencies.[120] Significant intergovernmental-lobby achievements include the devolutionary provisions of the Safe Drinking Water Act reauthorization and the Unfunded Mandates Reform Act (UMRA) framework for heightened congressional deliberation about legislation's federalism impacts.[121] More recently, they helped secure $250 billion in federal funding for state programs in the 2009 federal stimulus package[122] and won concessions for states in the Dodd-Frank Act.[123]

Relatedly, Professor Gerken focuses on the access and influence states enjoy as crucial implementers of federal policy, which compensate for federal resource constraints.[124] Even where states lack regulatory autonomy or are subservient participants in cooperative regimes, their implementation capacity creates incentives for federal officials to accommodate state preferences and has prompted changes in federal environmental and welfare programs, among others.[125] This form of state power is "interstitial and contingent on the

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[117] *See generally* NUGENT, *supra* note 29 (emphasizing intergovernmental lobby groups' role in political federalism).

[118] *See id.* at 9.

[119] *See id.* at 6–9; Pursley, *supra* note 64, at 572–76; Young, *supra* note 23, at 79.

[120] *See, e.g.*, NUGENT, *supra* note 29, at 144–45 (explaining lobbyists' influence in the rewriting of the Safe Drinking Water Act).

[121] *See* Safe Drinking Water Act Amendments of 1996, 42 U.S.C. §§ 300f, 300j-25 (2006); Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 (2012)); NUGENT, *supra* note 29, at 138–59 (discussing the Safe Drinking Water Act); Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1498 (2008) (discussing the UMRA).

[122] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered titles of the U.S.C.); ROBERT JAY DILGER, CONG. RESEARCH SERV., R40112, STATES AND PROPOSED ECONOMIC RECOVERY PLANS (2009) (detailing the intergovernmental lobby influence in including state assistance in the American Recovery and Reinvestment Act); NAT'L GOVERNORS ASS'N, STATE IMPLEMENTATION OF THE AMERICAN RECOVERY AND REINVESTMENT ACT (2009), *available at* http://arrm.org/pdfs/ARRASTATEIMPLEMENTATION.pdf; Ryan, *supra* note 35, at 29–30.

[123] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.); Ryan, *supra* note 35, at 30–31.

[124] *See* Bulman-Pozen & Gerken, *supra* note 30; Gerken, *supra* note 30, at 19, 40–41; Gerken, *supra* note 35, at 1553–60.

[125] *See* Bulman-Pozen & Gerken, *supra* note 30, at 1274–82 (citing Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27

national government's choice not to eliminate it"[126]—a "power of the servant" that may extend from pre-enactment lobbying through the life of a program.[127]

This is not an exhaustive catalogue. Scholars also suggest that partisan gerrymandering, state constitutional amendment processes, modern distrust of bureaucracy, and fragmented public opinion, among other things, function as nonjudicial federalism safeguards.[128] Despite disagreements about the details, however, few deny the existence of nonjudicial safeguards—developments like the UMRA strongly suggest that they exist—and it is unlikely that courts alone could preserve federalism.[129]

None of these accounts seems complete in itself: Each mechanism has pro-federalism effects and they interact to form a complex system operating across governmental processes to sustain states' structural presence.[130] Federal and state officials connected through party networks may also work together in cooperative regulatory settings; state officials may gain clout within parties through successful intergovernmental lobbying and, thus, may become national candidates or party leaders; sitting members of Congress depend on party networks for future electoral support; and so forth.[131] Some mechanisms depend on political contingencies rather than anything constitutionally

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PAC. L.J. 1521, 1556–61 (1996)) (describing instances of state resistance to federal directives in the context of cooperative regimes that prompted changes in national policy); Gerken, *supra* note 35, at 1558 (giving examples of federal dependence on state governments to implement federal programs); Ryan, *supra* note 35, at 31–36, 78–81 (highlighting state bargaining in cooperative regimes).

126 Bulman-Pozen & Gerken, *supra* note 35, at 1268. A more controversial possibility is that states might resist or disobey federal implementation directives and shape federal programs more directly according to state preferences—Gerken's "uncooperative federalism." *See id.* at 1292. There is little doubt that states' implementation resources are sufficiently important to insulate such actions from federal reprisal in some contexts; but this treads a bit closer than is comfortable to the outer limit of what is permissible on my view of our structural norms. *See* Pursley, *supra* note 68, at 512–19 (hypothesizing an implied preclusion of state action that undermines the constitutional structure).

127 *See* Gerken, *supra* note 35, at 1556–64; *accord* Bulman-Pozen & Gerken, *supra* note 35, at 1292.

128 *See* John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007 (2011) (characterizing state constitutional amendments as a form of federalism safeguard); Mikos, *supra* note 95, at 1673–74 (noting that voters' distrust of federal bureaucracy can function as a sort of federalism safeguard); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 862 (arguing that in some circumstances state power to draw federal legislative districts can serve to reinforce state autonomy).

129 *See* Young, *supra* note 23, at 79.

130 *See* BEDNAR, *supra* note 35, at 96; Bednar, *supra* note 35, at 270; *cf.* RYAN, *supra* note 36, at 266–67; Peabody & Nugent, *supra* note 70, at 56; Ryan, *supra* note 36, at 4–5; Young, *supra* note 23, at 9 (describing federalism as a "web of relationships").

131 *See* Kramer, *supra* note 24, at 285–86.

mandatory,[132] but this distinction matters little for assessing the system's present stability. Contingent and mandatory mechanisms interact—this makes the system stronger, but also means that undermining one mechanism may have outsized consequences for others and for the system as a whole.[133] The distinction may, however, matter for the normative implications of political change. Contingent mechanisms naturally change over time; erosion of mandatory mechanisms may be a constitutional violation.[134]

II. DISRUPTING THE SYSTEM

One of the most significant changes in national politics in recent decades is the expansion of *independent expenditures* by outside groups—not campaign contributions,[135] but spending outside the control of candidates or parties—to influence federal elections.[136] All nonjudicial federalism safeguards depend on stable political processes in which states retain influence—they depend, in other words, on the existence of durable incentives for federal officials to take state interests seriously. The unprecedented explosion of independent spending following *Citizens United* threatens these conditions and, thus, threatens the system.

Unregulated independent expenditures should worry federalism theorists for the same reason that it worries advocates of campaign finance regulation: Those capable of spending large amounts to elect candidates exercise outsized influence in government.[137] That, in itself, might be viewed as a form of

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[132] *See* Young, *supra* note 23, at 74–75.

[133] *See* VERMEULE, *supra* note 36, at 30 (discussing nonlinear causation in complex systems); *supra* notes 35–36 and accompanying text.

[134] *See supra* notes 68–75 and accompanying text.

[135] Expenditures that are coordinated with campaigns are deemed contributions subject to federal contribution limitations, which survive *Citizens United* for campaigns and parties. *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 464 (2001). It's difficult to police coordination; thus the dissolution of independent expenditure limitations may functionally dissolve contribution limits as well. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 659 n.160 (2000).

[136] The Federal Election Campaigns Act (FECA) defines "independent expenditure" as "an expenditure . . . expressly advocating the election or defeat of a clearly identified candidate; and . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17) (2012); *see also* 11 C.F.R. § 100.16(a) (2012).

[137] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 125 n.13 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am., 352 U.S. 567, 577–78 (1957) (quoting 86 CONG. REC. 2720 (1940)); Zephyr Teachout, *The Anti-*

corruption requiring regulation; but even under the narrower view of corruption adopted in *Citizens United*, there remains an obvious interest-mismatch problem[138]: Those with the resources to spend lavishly on campaign-related activities tend to be wealthy individuals and organizations. Public choice theory suggests that these spenders often have preferences that conflict with the general public interest.[139] So, too, their preferences—for cost-reducing regulatory standardization or deregulation, in particular—often will conflict with states' interests in continuing regulatory power. In this Part, I describe how *Citizens United* and its progeny deregulate outside electoral spending, making it possible for outside-group influence to grow without limit. The power of money in politics is a longstanding concern; but the world is categorically different now—federal law after *Citizens United* funnels large amounts of money away from party control to independent groups empowered to build enormous influence over specific candidates by spending without limit to directly advocate for their election.[140] As this new form of independent spending becomes increasingly central to campaign strategy—and Super PACs already were the primary ad buyers in the 2012 Republican presidential primary[141]—it will expand channels of influence over federal officeholders for interests potentially hostile to state autonomy.[142] This could bring down the system of federalism if outside groups become significant enough in national campaigns to replace—or significantly diminish—the influence of state governments and their advocates in national political parties, lobbies, and other settings.

Corruption Principle, 94 CORNELL L. REV. 341, 387–97 (2009) (assessing various corruption-related rationales for campaign finance regulation).

138 *Citizens United*, 558 U.S. at 357.

139 Mancur Olson's work is seminal and at the foundation of public choice theory. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) [hereinafter OLSON, COLLECTIVE ACTION] (arguing that interest group influence can explain most governmental action such that references to the pursuit of national interests may be misleading); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 67–74 (1982) [hereinafter OLSON, NATIONS] (arguing that political groups' narrow agendas frequently run counter to broadly shared public interests). For a foundational treatment of the implications of public choice insights for law, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 22–30 (1991); for discussion of public choice dynamics in elections, see Luis Roniger, *Political Clientelism, Democracy, and Market Economy*, 36 COMP. POL. 353, 354 (2004) (book review).

140 *See infra* Part III.B.

141 *See, e.g.*, Nicholas Confessore, *Campaigns Grow More Dependent on 'Super PAC' Aid*, N.Y. TIMES, Feb. 21, 2012, at A1; Jeremy W. Peters, *'Super PACs,' Not Campaigns, Do Bulk of Ad Spending*, N.Y. TIMES, Mar. 3, 2012, at A10.

142 *See infra* Part III.A.

A. Federal Campaign Finance Law—FECA to BCRA

Citizens United changed the regulatory landscape for outside groups that wish to spend money to influence elections, and, therefore, the structure of electoral politics.[143] At issue was a provision of the 2002 Bipartisan Campaign Reform Act (BCRA)[144] that prohibited corporations and unions from spending general treasury funds on "electioneering communications"—communications that expressly advocate for the election or defeat of a candidate proximate to an election date.[145] This expanded a provision of the 1972 Federal Election Campaigns Act (FECA)[146] that precluded corporations and unions from using general treasury funds for campaign contributions or independent expenditures underwriting "express advocacy"—famously defined by the Court as a communication containing certain "magic words" indicating the sponsor's preference regarding a particular federal candidate.[147]

Corporations and unions have been subject to campaign spending restrictions of one form or another for the better part of a century.[148] *Citizens United* did not alter existing contribution limits on outside groups, corporations, or unions.[149] The dramatic spending increases in recent decades have come in the form of independent expenditures.[150] The legal status of independent expenditures has developed in part as a function of the development of the law governing corporate and union campaign spending. Corporations have not, however, been politically hobbled—they have long been permitted to form political action committees—"separate, segregated fund[s] to be utilized for political purposes," including making contributions to candidates and parties and independently funding express advocacy.[151]

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143 *See* Briffault, *supra* note 8, at 1683–87 (arguing that contribution limits are, after *Citizens United*, "functionally meaningless" such that the campaign finance environment now resembles the so-called Wild West).

144 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

145 *See* 2 U.S.C. §§ 434(f)(3)(A)(i), 441b(b)(2), 441b(c)(1) (2012).

146 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

147 *See* 2 U.S.C. § 441b(a); Buckley v. Valeo, 424 U.S. 1, 44 & n.52, 45 (1976).

148 *See* Act of Jan. 26, 1907, ch. 420, 34 Stat. 864, 864–65 (banning corporate and union contributions).

149 *See* Citizens United v. FEC, 558 U.S. 310, 349–51 (2010); Briffault, *supra* note 8, at 1678; Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 125 (2010).

150 *See supra* notes 135–36 and accompanying text.

151 2 U.S.C. § 441b(b)(2); *see also* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (1972) (codified as amended at 2 U.S.C. § 441b(b)) (containing the original Taft Hartley provision covering PACs); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 450 (1972) (Powell, J., dissenting); *cf.* United States v. Congress of Indus. Orgs., 335 U.S. 106, 123 (1948) (reading a PAC exception

Contributions to PACs are limited both by source and in amount—PACs may solicit only from the shareholders, executives, and administrative personnel of the underlying corporation and, in some instances, their family members, and those contributions are limited to $5,000 per year.[152] There are no limits on PACs' independent spending.[153] Thus through PACs, corporations could do—somewhat indirectly—some of the things that federal campaign finance law barred them from doing directly before *Citizens United*.[154]

FECA, as amended in 1974, also imposed general restrictions on contributions to candidates and parties and on independent "expenditure[s] . . . relative to a clearly identified candidate"[155] by individuals, groups, candidates and parties for election-related activity; imposed reporting and disclosure requirements for campaign spending; created a public financing system for presidential elections; and, among other things, created the Federal Election Commission (FEC).[156] The Supreme Court assessed FECA's constitutionality against a First Amendment challenge in *Buckley v. Valeo*.[157] It upheld the contribution limitations based on the government interest in preventing "*quid pro quo* corruption"—meaning the direct exchange of campaign money for votes or favors[158]—as did the Court in *Citizens United*.[159] But the Court struck down FECA's *expenditure* limitations, concluding that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[160]

Although *Buckley* did not squarely address the constitutionality of FECA's ban on independent corporate and union campaign spending, the Court did

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into Taft Hartley); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After* Citizens United, 20 CORNELL J.L. & PUB. POL'Y 643, 647–48 (2011).

152 *See* 2 U.S.C. §§ 441a(a)(1)(C), 441b(b)(4)(B).

153 Briffault, *supra* note 151, at 647.

154 *See id.* at 647–48.

155 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1265 (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

156 *See id.* §§ 101, 201, 310–311, 406; *see also* 2 U.S.C. § 441a; Buckley v. Valeo, 424 U.S. 1, 12–13 (1976) (describing FECA); Press Release, FEC, FEC Announces 2011-12 Campaign Cycle Contribution Limits (Feb. 3, 2011), http://www.fec.gov/press/20110203newlimits.shtml (discussing general contribution limits).

157 *See* 424 U.S. at 13–14, 29.

158 *See id.* at 26–28; Citizens United v. FEC, 558 U.S. 310, 357 (2010) (discussing "*quid pro quo* corruption").

159 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) (reaffirming the constitutionality of "government-imposed limits on contributions to candidates" after *Citizens United*).

160 *Buckley*, 424 U.S. at 47.

indirectly narrow the ban's scope.[161] To avoid overbreadth, the *Buckley* Court construed FECA's reporting and disclosure requirements—and by implication the ban on corporate and union spending—to apply only to express advocacy—communications directly advocating the election or defeat of a specific, clearly identified candidate.[162] Express advocacy, the Court explained in a footnote, could be distinguished by its use of words like "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"[163] This interpretation gave rise to "issue advocacy"—the creation of campaign-related communications carefully designed to fall outside *Buckley*'s technical definition of "express advocacy," and thus outside the scope of FECA's spending and disclosure requirements.[164] Issue ads are often functionally indistinguishable from express advocacy from the voters' perspective[165]—they could "advocate the election . . . of clearly identified federal candidates" so long as they avoided using the magic words, but there is "[l]ittle difference . . . , for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'"[166] Thus PACs, corporations, unions, and other groups could spend unlimited sums on issue ads without running afoul of FECA restrictions—though they could not collect contributions over FECA caps[167]—so long as the ads were not coordinated with federal candidates or instances of express advocacy.[168] Issue-ad spending exploded before the BCRA was enacted—rising from about $135 million in the 1996–1997 election cycle to $500 million

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161 *See* McConnell v. FEC, 540 U.S. 93, 122 (2003), *overruled in part by Citizens United*, 558 U.S. 310; Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 588–89 (2011).

162 *See McConnell*, 540 U.S. at 126 (citing *Buckley*, 424 U.S. at 80).

163 *Buckley*, 424 U.S. at 44 n.52; *see also McConnell*, 540 U.S. at 126 (dubbing *Buckley*'s list of express advocacy hallmark terms the "magic words"). Most lower federal courts read *Buckley*'s "magic words" as a requirement for campaign activity to be considered "express advocacy" subject to FECA's requirements. *See* Richard Briffault, *Soft Money Reform and the Constitution*, 1 ELECTION L.J. 343, 351 & n.67 (2002) (citing, as an example of the common approach, *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997), but also citing *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), finding an instance of express advocacy without the "magic words").

164 *See McConnell*, 540 U.S. at 126–28; Hasen, *supra* note 161, at 588–89.

165 *McConnell*, 540 U.S. at 126–27.

166 *Id.*

167 *See id.* at 122–26.

168 *Id.* at 128. Issue ads are treated as contributions under FECA regulations if coordinated with federal candidates or campaigns. *See* 2 U.S.C. § 441a(a)(7)(B)(i) (2012); Briffault, *supra* note 135, at 624–25.

in 1999–2000.[169] Nevertheless, direct electioneering was still controlled by the parties, whose capacity was dramatically expanded by soft money.[170]

FECA defines *contributions* as donations "made by any person for the purpose of influencing any election for *Federal* office"[171] and requires that spending on federal-election activity by or coordinated with campaigns or parties be funded by contributions—"hard" money.[172] Another FECA loophole developed in the late 1970s, when the FEC, in part at the urging of state party committees,[173] ruled that party committees could fund "mixed-purpose" election-related activities—activities that benefit the party ticket, including both state and federal candidates, as a whole—with "soft" money raised outside FECA's dollar and source limitations.[174] These rulings and a 1979 FECA amendment exempting state and local party-building activities from hard money requirements[175] combined to allow state parties to collect unlimited contributions from individuals, corporations, unions, PACs, and other nonparty/candidate donors to fund a wide variety of state and local party-building and campaign activities—other than express advocacy—even if they benefit state *and federal* candidates.[176] Soft money contributions were limited only by FEC regulations specifying permissible apportionment of hard and soft money[177] and state campaign finance laws, many of which were more lenient

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169 *See McConnell*, 540 U.S. at 127 n.20.

170 *See id.* at 124–26.

171 2 U.S.C. § 431(8)(A)(i) (emphasis added).

172 *McConnell*, 540 U.S. at 122; *see* Briffault, *supra* note 135, at 628.

173 *See* Briffault, *supra* note 135, at 629 (noting that "[i]n the late 1970s, various state party committees began to press the FEC to allow them to use funds that did not comply with FECA to partially finance campaign efforts that help the party ticket as a whole, including both federal and state candidates").

174 *See* FEC Advisory Op. 1979-17 (July 16, 1979), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=1979-17; FEC Advisory Op. 1978-10 (Aug 29, 1978), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=1978-10; *see also McConnell*, 540 U.S. at 123; L. PAIGE WHITAKER, CONG. RESEARCH SERV., IB98025, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY 2 (2004); Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 598–99 (2000); Briffault, *supra* note 163, at 345.

175 2 U.S.C. § 431(8)(B)(x), (xii) (1982) (current version at 2 U.S.C. § 431(8)(B)(x), (xi) (2012)).

176 *See McConnell*, 540 U.S. at 122–23 & n.7. FEC regulations allowed parties to apportion administrative mixed-purpose activity expenses on a reasonable basis between hard-money accounts and accounts containing soft money. *See* 11 C.F.R. § 102.6 (2013); FEC Advisory Op. 1979-17 (July 16, 1979), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=1979-17; FEC Advisory Op. 1978-10 (Aug 29, 1978), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=1978-10.

177 National parties could fund forty percent of most mixed-purpose activities with soft money in years other than presidential election years and thirty-five percent of such activities with soft money in presidential election years, *see* 11 C.F.R. § 106.5(b)(2); state party committees could combine hard and soft money based on the ratio of federal to nonfederal offices on their ballots, *see id.* § 106.5(d)(1) (repealed 2002), "which in

than FECA.[178] Soft money grew modestly in the 1980s,[179] but began to surge after a 1995 FEC decision permitting the parties to use soft money for issue ads[180]: It increased from $86 million in the 1992 election cycle to about $225 million in 1998,[181] leveling off at about $500 to $600 million in 2000 and 2002.[182] Importantly for our purposes, the national parties channeled significant soft money *through state party committees* because state parties could use more soft money for campaign activities, infrastructure, and "shared voter mobilization programs such as direct mail campaigns and phone bank operations" that could benefit both state and federal candidates.[183]

The 2002 Bipartisan Campaign Reform Act closed the soft-money loophole almost entirely—barring (1) national-party and federal-candidate solicitation and use of soft money, including fundraising on behalf of outside groups; (2) contributions of soft money to state or local parties for "federal election activity"; and (3) state candidates' use of soft money to fund electioneering communications.[184] It exempts donations to state or local party committees of up to $10,000 per year for party-building activity that does not refer to a

practice meant that they could expend a substantially greater proportion of soft money than national parties to fund mixed-purpose activities affecting both federal and state elections." *McConnell*, 540 U.S. at 123 n.7.

178 *See* Briffault, *supra* note 135, at 628–29; *see also* MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 10, 16–17 (1998).

179 *See* Briffault, *supra* note 135, at 629–30 (noting that soft money grew faster in the 1990s than in the 1980s).

180 *See* FEC Advisory Op. 1995-25 (Aug. 24, 1995), *available at* http://saos.nictusa.com/saos/searchao?AONUMBER=1995-25; Briffault, *supra* note 135, at 630–31; *see also McConnell*, 540 U.S. at 124 ("As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000.").

181 *See* Briffault, *supra* note 135, at 630 (citing Press Release, FEC, FEC Reports on Political Party Activity for 1997–98 (Apr. 9, 1999), http://www.fec.gov/press/ptyye98.htm; Press Release, FEC, Political Party Fundraising Continues to Climb (Jan. 26, 1999), http://www.fec.gov/press/press1999/pty3098.htm).

182 *See McConnell*, 540 U.S. at 124 & n.8; Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 79, 81 (Michael J. Malbin ed., 2006) ("[T]he national parties raised $496 million in soft money in the 2002 cycle; and state parties raised an estimated $95 million in soft money for federal elections in the same cycle."); Katharine Q. Seelye, *Senate Democrats Surpassed G.O.P. in Soft Money in 2000*, N.Y. TIMES, Mar. 16, 2001, at A1.

183 Briffault, *supra* note 135, at 629; *accord McConnell*, 540 U.S. at 124; Nathaniel Persily, *Soft Money and Slippery Slopes*, 1 ELECTION L.J. 401, 406–08 (2002) (highlighting the complex interconnections of national and state party finance as a significant obstacle to the effectiveness of the BCRA).

184 *See* 2 U.S.C. § 441i(a)–(f) (2012). Cutting soft money cut into the parties' newly expanded resources. *Cf.* Briffault, *supra* note 135, at 626 ("The parties . . . have done well under FECA. They raise far more money than ever before, and they are playing a growing role in the financing of federal election campaigns."). I discuss this consequence in more detail *infra*, Part III.B.

clearly identified federal candidate.[185] The provision barring the use of corporate or union treasury funds for electioneering communications—broadcast communications targeted at constituents of clearly identified federal candidates thirty days before a primary or sixty days before a general election[186]—closes the sham issue-ad loophole.[187]

Congress enacted the BCRA during a period in which the Supreme Court appeared to be moving away from the jurisprudential core of *Buckley*[188]: The Court gradually expanded the category of government interests justifying campaign finance regulations beyond *Buckley*'s narrow focus on quid pro quo corruption.[189] For example, the Court upheld a Michigan prohibition on corporate expenditures in state elections in view of the government's interest in precluding "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[190] Three later decisions made clear that this expanded definition of "corruption" includes "the broader threat from politicians too compliant with the wishes of large contributors,"[191] and identified restrictions on both

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185 *See* 2 U.S.C. § 441i(b)(2)(B)(iii).

186 *Id.* § 434(f)(3)(A)(i). Corporations may still fund issue advertising through PACs, *McConnell*, 540 U.S. at 204, but the provision expands disclosure and reporting requirements to anyone spending over a threshold amount on electioneering communications, 2 U.S.C. § 434(f)(1).

187 *See McConnell*, 540 U.S. at 132; Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 700–01 (2012); Hasen, *supra* note 161, at 588. Under FECA, an "independent expenditure" is one that funds a communication "expressly advocating the election or defeat of a clearly identified candidate" not coordinated with candidates or parties. 2 U.S.C. § 431(17). The BCRA's "electioneering communication" category is both broader, encompassing any radio or television communications that "refer[] to a clearly identified candidate for Federal office" rather than just instances of express advocacy, and narrower, including only communications targeted to the candidate's constituency and aired less than thirty days before a primary or sixty days before a general election. *Id.* § 434(f)(3)(A); *see* Briffault, *supra*, at 686.

188 *See* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1730 (2001) (canvassing cases); Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 39–46 (2004) (collecting cases); Kang, *supra* note 10, at 4 ("The definition of corruption had subtly but unmistakably expanded under the Rehnquist Court to permit a wide range of campaign finance regulation ranging from contribution limits to various restrictions on corporate and union spending to prohibitions on party soft money."); Teachout, *supra* note 137, at 387–97 (collecting cases).

189 *See, e.g.*, *McConnell*, 540 U.S. at 204–05.

190 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); *accord* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207 (1982) (noting the advantages of corporations in accumulating political influence and the particular dangers of corporate financial influence in politics).

191 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).

coordinated party–PAC expenditures and corporate campaign contributions as permissible responses to that threat.[192]

This new approach reached its apex in *McConnell v. FEC*.[193] The *McConnell* Court upheld the BCRA's soft-money restrictions as permissible implementations of *Buckley*'s quid-pro-quo-corruption interest[194] as well as strong governmental interests in precluding wealthy donors from gaining "undue influence on an officeholder's judgment,"[195] preventing the "appearance of corruption" created by "the selling of access,"[196] preventing "the corrosive and distorting effects of" corporate wealth on the political process,[197] and "preventing circumvention of otherwise valid contribution limits."[198] The Court suggested that holding permissible only regulations targeted at quid pro quo corruption or its appearance, to the exclusion of these other interests, defies "common sense[] and the realities of political fundraising."[199] Thus the Court accorded substantial deference to Congress's conclusions—for example, regarding the potential for state and local parties, or tax-exempt political organizations, to replace national party committees as "conduits" by which money might influence federal elections despite federal regulations.[200]

In upholding the BCRA's provision barring sham issue ads, the Court cited FECA's corporate spending bar as proof that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections [is] firmly embedded."[201] The Court further held that its expanded list of election-related government interests—especially those suggesting that "the special characteristics of the corporate structure require

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192 *See* FEC v. Beaumont, 539 U.S. 146, 155 (2003); FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado Republican II*), 533 U.S.431, 452 (2001).

193 *See McConnell*, 540 U.S. at 147–85 (describing the soft-money provisions); *id.* at 202–11 (assessing the BCRA's electioneering-communications provisions).

194 *See id.* at 145, 150–52 (citing examples of actual corruption—"[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation").

195 *Id.* at 143 (quoting *Colorado Republican II*, 533 U.S. at 441) (internal quotation marks omitted).

196 *Id.* at 145, 154.

197 *Id.* at 205 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)) (internal quotation mark omitted).

198 *Id.* at 185; *see id.* at 188–89 (issuing holding).

199 *Id.* at 152.

200 *Id.* at 174 (tax exempt organizations); *id.* at 185 (holding that restricting contributions to tax-exempt entities is justifiable to preclude circumvention of soft-money limits).

201 *Id.* at 203.

particularly careful regulation"—justified barring independent corporate and union funding of electioneering communications, including sham issue ads.[202] The Court deferred to Congress's findings that corporations and unions were using their general treasuries "to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections," and it joined Congress in concluding that most of these "are the functional equivalent of express advocacy" under *Buckley*.[203]

B. Citizens United *and the Birth of Super PACs*

After *McConnell*, campaign finance doctrine moved dramatically back in *Buckley*'s direction.[204] Among other things, the Roberts Court invalidated state contribution limits as overly stringent[205] and narrowed the BCRA's restriction on electioneering communications to apply only to communications *functionally identical* to *Buckley*'s "express advocacy"—communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[206] *McConnell* was then fully repudiated in *Citizens United*, where the Court invalidated all federal restrictions on independent expenditures by corporations and unions.[207] The reasoning of *Citizens United* is more important than its immediate effect on corporate campaign spending.[208] The majority expressly rejected *McConnell*'s broader "access corruption" model and held that campaign finance restrictions are *only* justifiable based on the governmental interest in preventing quid pro quo corruption.[209] The Court thus easily concluded that independent

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[202] *Id.* at 203–05 (quoting FEC v. Beaumont, 539 U.S. 146, 155 (2003)) (internal quotation mark omitted).

[203] *Id.* at 205–07. The Court here was responding to an overbreadth challenge, such that the "functional equivalent" language goes to the scope of regulation permitted by the relevant governmental interests, not necessarily to the existence of the governmental interests—a burden analysis, in other words. In the *Wisconsin Right to Life* cases, however, the Roberts Court converted this language into the criterion for a legitimate governmental interest in regulation. *See* FEC v. Wis. Right to Life, Inc. (*WRTL II*), 551 U.S. 449, 455–82 (2007).

[204] *See* Hasen, *supra* note 161, at 589–90 (arguing that this may be because Justices Roberts and Alito joined the Court).

[205] *See* Davis v. FEC, 554 U.S. 724, 740–44 (2008); Randall v. Sorrell, 548 U.S. 230, 245–46 (2006).

[206] *WRTL II*, 551 U.S. at 469–70.

[207] *See* Citizens United v. FEC, 558 U.S. 310, 366 (2010). The decision invalidates more than twenty similar state laws by implication. *See Life After* Citizens United, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx (last updated Jan. 4, 2011).

[208] *See* Kang, *supra* note 10, at 4–5; Overton, *supra* note 20, at 1264; *see also* Briffault, *supra* note 151, at 650 (arguing that *Citizens United*'s deregulation of *corporate* campaign spending is relatively insignificant because the *WRTL II* decision basically did that).

[209] *See Citizens United*, 558 U.S. at 359. *See generally WRTL II*, 551 U.S. at 478–79 ("This Court has long recognized 'the governmental interest in preventing corruption and the appearance of corruption' in

expenditures—which by definition do not involve exchanges with candidates—"do not give rise to corruption or the appearance of corruption" and, therefore, cannot be regulated.[210] In rejecting *McConnell*'s focus on the potential for wealthy interests to gain undue influence over candidates even without direct contact, the Court stated that influence is endemic to the democratic process: "Favoritism and influence are not . . . avoidable in representative politics. . . . [A] substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors."[211]

A familiar metaphor is that campaign finance is "hydraulic"—"political money, like water, has to go somewhere,"[212] and it will typically flow into the least regulated channel to the relevant objective.[213] After the BCRA's ban on parties' use of soft money was upheld in *McConnell*, many soft-money donors shifted their contributions from the parties to outside groups, including tax-exempt "527" and "501(c)" organizations that can engage in federal election activity without satisfying the requirements applicable to registered political committees.[214] Some focus on issue advocacy, but most engage in some combination of independent electioneering and "ground-game" activities like canvassing, voter registration, direct mail, turnout operations, and so forth.[215]

The 527 groups replaced parties as the preferred vehicle for unregulated campaign contributions and spending—taking in much of what would have flowed to parties as soft money before the BCRA.[216] The 2004 election cycle

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election campaigns. . . . Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." (quoting Buckley v. Valeo, 424 U.S. 1, 45 (1976)) (citing McConnell v. FEC, 540 U.S. 93, 204–06 (2003), *overruled in part by Citizens United*, 558 U.S. 310)).

210 *See Citizens United*, 558 U.S. at 357–58.

211 *Id.* at 359 (first omission in original) (quoting *McConnell*, 540 U.S. at 297) (internal quotation mark omitted).

212 Issacharoff & Karlan, *supra* note 10, at 1708.

213 Kang, *supra* note 10, at 5.

214 *See* Richard Briffault, *The 527 Problem . . . and the* Buckley *Problem*, 73 GEO. WASH. L. REV. 949, 950 (2005); Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the* McConnell *Decision*, 22 YALE L. & POL'Y REV. 235, 245–50 (2004); Issacharoff, *supra* note 16, at 120.

215 *See* Holman & Claybrook, *supra* note 214, at 247.

216 *See id.* at 247 (noting that 527s "had been the favorite vehicle for special interest groups seeking to influence federal elections, especially prior to the 527-disclosure law of 2000"). Briffault notes that some soft money was not redirected—corporations instead reduced political spending because outside groups could not provide access like parties. *See* Briffault, *supra* note 214, at 962–65.

was "the '[s]ummer of the 527s'"[217]—tax-exempt organizations spent over $400 million, or about ten percent of total spending and nearly twenty-five percent of spending on the presidential contest, during that period.[218] After disclosure requirements were put in place for 527 groups, the 501(c) designation became more attractive.[219] Because 501(c) groups must have a "primary purpose" other than electoral activity, they are not subject to FECA disclosure requirements.[220] However, most 501(c) groups are *corporations*; thus, until *Citizens United*, they were subject to corporate spending restrictions and had to rely on capped contributions or PAC activities.[221] Despite the soft-money period and the growth of tax-status groups after *McConnell*, "the soft-money and electioneering communications provisions of BCRA . . . to a considerable degree restored the post-Watergate era campaign finance structure" and, despite their activity in 2004, outside groups were "peripheral" such that "[t]he 2008 presidential election largely abided by the post-Watergate rules, supplemented by BCRA."[222] In short, the growth of outside-group influence during these periods *had* been staunched, and something like the FECA baseline regulatory environment restored, until *Citizens United*.

The *Citizens United* Court's conclusion that only the interest in preventing quid pro quo corruption justifies regulation prompted additional deregulation. The D.C. Circuit, relying on that reasoning, held in mid-2010 that political committees making only independent expenditures may accept unlimited contributions from individuals.[223] The court exempted such groups from the $5,000 limit on contributions to PACs[224] on the ground that independent

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217 Briffault, *supra* note 214, at 950 (alteration in original).

218 *See id.* at 961; Weissman & Hassan, *supra* note 182, at 103–04 (noting that total 527 expenditure in 2004 was $398.5 million, a significant increase from 2002). Of the roughly $4 billion spent by all groups on the 2004 presidential campaign, 527 spending accounted for about one-tenth. *See* Briffault, *supra* note 214, at 961.

219 Briffault, *supra* note 187, at 685–86; Holman & Claybrook, *supra* note 214, at 248–49.

220 *See* 26 U.S.C. § 501(c) (2012); Holman & Claybrook, *supra* note 214, at 247, 252 (labeling this the "primary purpose" requirement). The primary-purpose criterion parallels the Court's holding in *Buckley* that only organizations whose "major purpose" is to nominate or elect a federal candidate are "political committees" under FECA. *See* Buckley v. Valeo, 424 U.S. 1, 79 (1976).

221 *See* Briffault, *supra* note 187, at 685; *see also* Spencer MacColl, Citizens United *Decision Dramatically Affects Political Landscape*, OPENSECRETS.ORG (May 5, 2011, 11:16 AM), http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html (follow link; then go to the third slide of the slideshow) (estimating that 501(c) groups spent $78.95 million in 2008 and $134.43 million in 2010).

222 Briffault, *supra* note 8, at 1683.

223 *See* SpeechNow.org. v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010).

224 *See* 2 U.S.C. § 441a(a)(1)(C) (2012).

electoral activity cannot give rise to quid pro quo corruption.[225] The FEC quickly followed with advisory opinions allowing corporations and unions to contribute to independent-expenditure-only committees in unlimited amounts.[226] Super PACs were born.

Unlike 527 and 501(c) entities, Super PACs *are* political committees subject to FECA;[227] but they benefit from the combined effect of *Citizens United* and the post–*Citizens United* deregulatory rulings permitting them to collect unlimited donations from any source and spend unlimited amounts on independent election-related activity.[228] While there is still no formal regulation specific to Super PACs,[229] FEC guidance establishes that they cannot contribute to or coordinate with federal campaigns.[230] However, coordination is difficult to police and Super PACs have informal connections with candidates: Among other things, candidates and officeholders raise money for Super PACs;[231] their former staffers often run Super PACs; campaigns and Super PACs hire the same consultants;[232] Super PACs can use footage of candidates in their ads, including footage lifted from campaign

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225 *See SpeechNow.org*, 599 F.3d at 695–97; *see also* Citizens United v. FEC, 558 U.S. 310, 357–61 (2010) (relying on the same reasoning).

226 *See* FEC Advisory Op. 2010-11 (July 22, 2010), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=2010-11; FEC Advisory Op. 2010-09 (July 22, 2010), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=2010-09.

227 *See* R. SAM GARRETT, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 6–9 (2013), http://www.fas.org/sgp/crs/misc/R42042.pdf; Briffault, *supra* note 8, at 1645–50.

228 *See* GARRETT, *supra* note 227, at 6–9.

229 The FEC issued Notices of Proposed Rulemaking that would specifically regulate Super PACs, but has deadlocked or voted them down so far. *See* FEC Agenda Document No. 11-39, Minutes of an Open Meeting of the Federal Election Commission (June 15, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1139.pdf (noting that the FEC rejected on a 4–2 vote NPRM 11-33 and deadlocked on NPRM 11-33-A); FEC Agenda Document No. 11-06, Minutes of an Open Meeting of the Federal Election Commission (Jan. 20, 2011), http://fec.gov/agenda/2011/approved2011_06.pdf (noting that the FEC deadlocked on both NPRM 11-02, Draft A, and NPRM 11-02-A).

230 *See* GARRETT, *supra* note 227, at 3, 4 tbl.1. Coordinated activities constitute campaign contributions under FECA and FEC regulations. *See* 2 U.S.C. § 441a(a)(7)(B) (2012) (defining coordination); *see also* 11 C.F.R. § 109.21 (2012).

231 *See* FEC Advisory Op. 2011-12 (June 30, 2011), *available at* http://saos.nictusa.com/saos/aonum.jsp?AONUM=2011-12.

232 Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. TIMES, Feb. 26, 2012, at A1 (noting crossovers); Andy Kroll, *Candidates and the Totally Unrelated Super-PACs That Love Them*, MOTHER JONES (Jan. 20, 2012, 4:00 AM), http://www.motherjones.com/mojo/2012/01/stephen-colbert-citizens-united-super-pac (noting that Super PACs are frequently staffed with former staff of candidates or party leaders and sometimes even family members); Martina Stewart, *Super PACs' Money Could Tip Balance of Power in Congress*, CNN (Jan. 26, 2012, 2:25 PM), http://www.cnn.com/2012/01/26/politics/super-pac-general (noting mechanisms of informal coordination).

ads;[233] and some campaign plans have been posted online for anyone—including Super PACs—to view and follow.[234]

Super PACs frequently circumvent the relatively weak federal disclosure requirements for political committees[235]—donations through shell corporations with vague names or to affiliated nonprofits are common as Super PACs need only disclose the corporation's name.[236] For example, American Crossroads Grassroots Political Strategies (GPS), a 501(c)(4) nonprofit, runs the "American Crossroads" Super PAC. The nonprofit can accept unlimited donations, protect the donors' identities, and transfer the money to the Super PAC to spend, avoiding the primary-purpose restriction.[237] "[L]ess than half of the independent expenditures by outside groups during the 2010 election cycle were made with disclosure of the contributors' identities," in part because "outside groups have great incentives to avoid . . . disclosure when contributors prefer anonymity, and particularly when the independent expenditures are the type of inflammatory rhetoric that these groups are willing at times to sponsor."[238] Easy anonymity may therefore incentivize ideologically extreme campaign activity.

As professor Kang summarizes,

> [P]ost-*Citizens United*, outside groups that engage in forthright and extensive campaigning, in the form of independent expenditures, operate entirely outside campaign finance regulation as it had existed for more than thirty years since *Buckley*. The three major pillars of campaign finance law—(1) source restrictions on corporations and unions; (2) contribution limits; and (3) disclosure of contributors and contributions—do not apply to them.[239]

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233 *See* Briffault, *supra* note 8, at 1681.

234 *See* Kang, *supra* note 10, at 37 ("[I]n 2010 . . . the National Republican Congressional Committee publicly revealed its advertisement-buying strategy" allowing "Republican-allied groups, led by the United States Chamber of Commerce, to coordinate their own ad buys.").

235 *See* Briffault, *supra* note 187, at 686–88, 691–93; Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 557–58 (2012).

236 *See* Briffault, *supra* note 187, at 686–88; Nicholas Confessore, Michael Luo & Mike McIntire, *In G.O.P. Race, A New Breed of Superdonor*, N.Y. TIMES, Feb. 22, 2012, at A1 (discussing megadonor gifts "through limited liability companies" with names like "F8 LLC, a company whose listed address in Utah leads to an accounting firm").

237 *See American Crossroads*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/detail.php?cmte=C00487363 (last visited Mar. 8, 2014).

238 Kang, *supra* note 10, at 49–50.

239 *Id.* at 35.

Super PACs' election-related expenditures in 2010 totaled about $62.6 million, and in 2012 totaled about $609 million—an almost tenfold increase and roughly two-thirds of all independent electoral spending in 2012.[240] "Dark money"—money for which the donor cannot be identified—appears to have roughly tripled in 2012 to about $400 million, or more than thirty-five percent of all outside spending.[241]

III. SUPER PAC POLITICS AND THE POLITICAL SAFEGUARDS OF FEDERALISM

The rise of Super PACs and outside spending is the most significant development in American politics in a generation.[242] All theories of political safeguards of federalism depend to some degree on the states' clout in the national lawmaking process. If interest group influence is to some extent zero-sum, such that loyalty to private interests that provide substantial campaign resources will displace loyalty to state-promoting interests, then increased outside-group influence has negative consequences for all pro-federalism political mechanisms. Increased private-interest capture of federal officials disrupts the representational relationships between officials and the geographic constituencies that push them to safeguard state interests in Wechsler's view.[243] The increased capacity of outside groups to support federal candidates also threatens to marginalize political parties—especially state and local party committees—undermining Kramer's institutional latticework for transmitting state concerns to federal officials. And enhanced access to federal candidates and officials because of increased campaign spending gives outside groups and their donors a competitive advantage over state lobbying organizations and state officials pressing state interests at various points in the policymaking process. While I focus on these three mechanisms—constituent pressure, parties, and intergovernmental lobbies—other political safeguards of

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240 *See* Imus, *supra* note 2 (discussing Super PAC spending as a percentage of all spending); *Super PACs*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/superpacs.php?cycle=2012 (last visited Mar. 8, 2014); *Super PACs*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/superpacs.php?cycle=2010 (last visited Mar. 8, 2014).

241 *See* Paul Blumenthal, *'Dark Money' in 2012 Election Tops $400 Million, 10 Candidates Outspent by Groups with Undisclosed Donors*, HUFFINGTON POST (Nov. 2, 2012, 1:36 PM), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html?view=print&comm_ref=false (reporting the figures).

242 *See* Bowie & Lioz, *supra* note 3 (citing statistics showing the increased political influence of Super PACs and outside spending).

243 *See* Wechsler, *supra* note 26, at 546 (arguing that federal legislators' geographic constituents will press for state preferences); *see also* Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 196–97 (2012) (explaining how lobbyists direct public policy by channeling resources to officials); Issacharoff, *supra* note 16, at 127–33.

federalism cannot help but be affected by this kind of tectonic shift in electoral politics. The political-safeguard systems' complexity and integration with other political dynamics suggests that such a perturbation may create outsized systemic consequences.

A. Incentives to Accommodate State Preferences

The dramatic increase in outside electoral spending occasioned by *Citizens United* and its progeny may erode the relationship between federal candidates and their geographic constituencies. Wechsler's view depends on those constituents' interests in the health of their state governments providing reelection incentives for federal officeholders to make federalism-conscious policy decisions.[244] If outside spending squeezes out the voices of local constituents—perhaps by providing so much campaign support that little actual constituent service is needed for reelection[245]—then Wechsler's safeguard is undermined. There is now a literature on the reasons Wechsler's view is no longer persuasive—some argue that voters are uninformed about federalism; others that they simply do not care because their focus is increasingly on national issues or their substantive policy preferences reliably trump any structural preference.[246] A recent study indicates that some voters may care more about federalism than these critical accounts suggest, particularly in election years;[247] but even if there remains something to Wechsler's mechanism, Super PACs threaten to undermine it decisively for the reasons I discuss here.[248] Another problem is that officials do not reliably prioritize their constituents' views over those of supportive interest groups. As independent expenditures have become functionally equivalent to direct contributions, we should expect them to generate influence for donors proportional to their

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[244] Wechsler, *supra* note 26, at 546. Federal candidates are durably dependent on state governments to draw congressional districts and conduct presidential primaries. *Id.* at 548–56. But it is not clear how significant this is relative to dependence on providers of significant campaign funding. The latter is, of course, more immediate, and the former is determined not just by the state government's feelings about any particular federal candidate but by a large set of factors that may not be sensitive to changes in candidates' policy priorities.

[245] *See generally* Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679 (2010) (collecting sources for the proposition that television commercials are perceived as more effective than other means of voter persuasion).

[246] *See, e.g.*, Devins, *supra* note 95, at 131 (arguing that voters care more about policy considerations than federalism per se); McGinnis & Somin, *supra* note 95, at 103–04 (arguing voter ignorance as to federalism concerns).

[247] *See* Mikos, *supra* note 95, at 1673–74, 1699–1703 (surveying empirical studies documenting some measurable voter interest in federalism).

[248] Nicholson-Crotty, *supra* note 38, at 299–300.

amounts.[249] Moreover, Super PACs have no systemic incentives to advocate federalism-reinforcing policies—more likely, they will disregard structural issues in favor of substantive policy preferences; use federalism rhetoric only strategically where it advances those underlying preferences; and, often, favor federal action *contrary* to state interests.[250] *Citizens United* and its progeny thus likely shift federal officials' incentives more decisively away from the interests of ordinary constituents and, therefore, on Wechsler's view, away from the institutional interests of states.[251]

Aside from this primary problem, other post–*Citizens United* dynamics are best explored in the context of Wechsler's theory. First, the perception of corruption may erode remaining incentives for ordinary constituents to attempt to influence their federal representatives.[252] *Citizens United* and Super PACs have increased public concern about the corrupting influence of money in politics. The Court distinguishes quid pro quo exchanges from other forms of "ingratiation" or "access" that, on its view, are not sufficiently corrupting to justify campaign finance restrictions.[253] But the public apparently does not make such a distinction—a significant majority view any service or favorable treatment for campaign supporters as corrupt and believe that large donors seek such rewards for their financial support.[254] Second, significant outside-group support may replace the electoral support that federal candidates would otherwise seek from state government and party officials—endorsements,

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249 *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (noting that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions"), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). *See generally* Issacharoff, *supra* note 16, at 126–27 (noting that the problem is not "what happens in the electoral arena but what incentives are offered to elected officials while in office").

250 *See infra* notes 270–89 and accompanying text.

251 *See* OLSON, COLLECTIVE ACTION, *supra* note 139, at 141–48 (describing capture of legislators by interest groups); Issacharoff, *supra* note 16, at 125–28 (arguing that capture occurs but that some legal conceptions of corruption do not encompass capture's predictable effects).

252 *See* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239, 239–40, 248–51 (2005) (discussing how politicians are increasingly reliant on the contributions of wealthy donors to support their campaigns, keeping influence increasingly in the hands of a smaller number of individuals); Briffault, *supra* note 214, at 954–55 (noting that large donations to outside groups makes it look like a few wealthy donors "play an enormous role in the electoral process, a role that mocks . . . political equality"); Overton, *supra* note 20, at 1277–82.

253 *See Citizens United*, 558 U.S. at 360.

254 *See* BRENNAN CTR. FOR JUSTICE, *supra* note 19, at 2 (discussing the historic public fear of corporate influence and recent public perception—about seventy percent of Americans now think officials favor Super PAC megadonors); Kennedy, *supra* note 19, at 3 (noting that nine of ten respondents viewed access and influence as corrupting, and that more than seven of ten respondents believed corporations seek access in exchange for financial support).

access to local information, fundraising and voter mobilization operations, etc.—and thereby close another channel for state interests to reach the agendas of federal officials.[255] Worse, if those state officials' support becomes another resource under the control of Super PACs, perhaps in exchange for Super PAC support for the state officials' own political ambitions, federal candidates may get the benefit of localized support without the accompanying pressure to prioritize state interests.[256]

As interest groups become more important to candidates' electoral success, candidates and officials will increasingly prioritize interest-group demands over others. This is sometimes called "clientelism."[257] Outside groups' new freedom to spend without limit to support candidates' campaigns makes easier and more likely the formation of patron–client relationships between candidates and outside interests that can provide significant campaign resources.[258] Systematic dynamics—including the nationalization of politics, the increasing cost of successful campaigns, and others—already foster interest groups' influence over policymakers.[259] But we still might profitably focus on reducing the worst instances—the "boulevards" and "express lanes" of private influence.[260] Regulation should attempt to prevent the formation of entrenched, long-term relationships in which officeholders "offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office."[261]

Among other things, the rise of Super PAC-funded elections promises to increase the influence of outside spending groups not connected to candidates' geographic constituencies and narrow candidates' agendas by narrowing their

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[255] *See infra* notes 341–63 and accompanying text; *see, e.g.*, Associated Press, *Clinton Leads Pack with 10 Endorsements from Governors*, ARKANSASONLINE (Jan. 23, 2008), http://www.arkansasonline.com/news/2008/jan/23/clinton-leads-pack-10-endorsements-governors/?print (noting that gubernatorial "endorsement[s] [are] campaign gold since governors have . . . their own grass-roots organizing and fundraising networks to share"); Andrea Kelly, *Candidate Endorsements Pile Up, but Do They Matter?*, ARIZ. PUB. MEDIA (Oct. 4, 2012), https://www.azpm.org/p/top-news/2012/10/4/16588-candidate-endorsements-pile-up-but-do-they-matter/ (reporting expert opinions that endorsements often come with access to campaign resources).

[256] *See infra* notes 366–69 and accompanying text (discussing the decreasing relevance of state officials' and party leaders' influence in federal elections vis-à-vis Super PACs).

[257] *See* Issacharoff, *supra* note 16, at 127.

[258] *See id.* at 127–28.

[259] Baker & Young, *supra* note 21, at 112–17 (describing the nationalization of politics); Issacharoff, *supra* note 16, at 127–29 (describing how increased election costs incentivize candidates to rely on outside-interest-group funding sources, which in turn increases the scope of the federal government when federal officials reward outside groups via federal policy changes).

[260] Issacharoff, *supra* note 16, at 129.

[261] *Id.* at 126.

donor bases. Both phenomena increase the risk of clientelism. Super PACs enhance the influence of megadonors who can single-handedly fund campaigns.[262] Such donors had been limited to capped PAC, party, or candidate contributions, or bankrolling their own ads or organizations;[263] Super PACs lower these transaction costs—and increase incentives to give—by providing a ready-made mechanism for large donors to pool funds and attract political experts to ensure those funds are spent to the greatest effect.[264] Super PAC support thus may narrow a candidate's agenda to that of a single individual, small group, or industry—and the risk of clientelism is greatest precisely "when there are only a few large donors, not when there are many donors who may be substantial but not critical."[265] Increased outside spending also undermines geographic constituencies by increasing candidates' incentives to seek campaign support outside their states or districts.[266] These risks are most pronounced in congressional and state elections, where candidates and parties spend less per race such that outside groups can have a significant impact with relatively small sums.[267] Several 2012 congressional races became magnets for outside spending: Virginia's U.S. Senate race involved roughly $51 million in outside spending—$19 million more than all candidates' primary and general election spending combined.[268] Outside group

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[262] *See* Bowie & Lioz, *supra* note 3; Nicholas Confessore, *Campaign Aid Is Now Surging into 8 Figures*, N.Y. TIMES, June 14, 2012, at A1 (reporting that a single donor spending $20 million "almost single-handedly bankrolled" a Super PAC that was primarily for Newt Gringrich's presidential run in 2012); *supra* notes 3–4 and accompanying text (reporting large-donor statistics).

[263] *See supra* Part II.A (describing contribution limitations).

[264] *Cf.* Kang, *supra* note 10, at 12–13 (noting the analogous transaction cost advantage of the corporate form for shareholders); Overton, *supra* note 20, at 1290–93 (describing the relative costs of fundraising).

[265] Issacharoff, *supra* note 16, at 137–38.

[266] *See, e.g.*, Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 8, 2012, at A1 (reporting a Texas megadonor gave $21 million to Super PAC activities in Florida and Virginia senate races); Phil Hirschkorn & Nancy Cordes, *A Record Amount of Money Spent on Wisconsin Recall*, CBS NEWS (June 6, 2012, 9:40 PM), http://www.cbsnews.com/8301-503544_162-57448678-503544/a-record-amount-of-money-spent-on-wisconsin-recall/ (reporting outside groups spent roughly $33 million in the 2012 Wisconsin statewide election); Andy Kroll, *The Super-PAC Steamroller: Coming to a Town Near You!*, MOTHER JONES (Apr. 25, 2012, 3:00 AM), http://www.motherjones.com/politics/2012/04/super-pac-state-local-james-bopp (detailing state-based Super PAC spending on congressional races in other states).

[267] *See Price of Admission*, OPENSECRETS.ORG, http://www.opensecrets.org/bigpicture/stats.php?cycle=2010&display=A&type=W (last visited Mar. 8, 2014) (reporting the average hard-money cost of successful 2010 House or Senate campaigns as $1.47 million and $8.9 million, respectively); *see also* Kroll, *supra* note 266 (describing Super PACs moving into state politics).

[268] *See* Michelle Martinelli, *Massachusetts, Virginia Senate Among 2012's Most Expensive Races*, OPENSECRETS.ORG (Nov. 6, 2012, 1:42 PM), http://www.opensecrets.org/news/2012/11/massachusetts-virginia-senate-among.html.

involvement on one side of a congressional race has forced the other candidate to seek outside help to remain competitive.[269]

Even ignoring distortion of Wechsler's mechanism, there are reasons to think that Super PAC politics will intensify officials' incentives to pursue policies inconsistent with state interests at the urging of private interests. Empirically, a majority of political influence organizations represent business interests.[270] The factors creating corporations' comparative advantage in rent-seeking—wealth, established institutional structures and discipline, and long-term relationships with federal officials—likely confer similar advantages on megadonors funding Super PACs and nonprofits.[271] Such interests tend to favor deregulation and other free market policies that often conflict with states' institutional interests.[272] Take, for example, federal preemption of state law. Industries have the straightforward financial incentive to seek federal preemption where they face multiple regulatory regimes or otherwise high transaction costs.[273] Cost-reducing centralization and deregulation are most efficiently accomplished by preemptive federal legislation—a single initiative in Congress can accomplish what would otherwise require action by each statehouse, states have little recourse against federal preemption, and industries

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269 *See* Confessore, *supra* note 18; Posner, *supra* note 6.

270 *See* McConnell v. FEC, 540 U.S. 93, 147–53 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 88–97 (2d ed. 2006) (noting that business interests dominate the lobbying community); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 65–70 (1986) (concluding that seventy percent of interest groups active in federal policymaking were business oriented).

271 *Cf.* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1109, 1113 (2002) (arguing that corporations can outspend state governments and state lobbies in national politics).

272 *See* THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 57 (2008) (observing that "[b]usiness interests generally prefer limited government" because "[t]hey would rather go about their business without worrying about 'intrusive' governmental regulations and 'abusive' lawsuits"). Interest groups that operate at the federal level will tend to favor federal action—including for deregulation, which can be most efficiently accomplished through centralized action—and thus to resist decentralizing power to the states. *See generally* JEFFREY M. BERRY, LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS (1977) (observing that interest groups generally push for centralized solutions even to localized problems); JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER (1992) (describing the steady increase of federal political power as a result of congressional preemption of state regulatory authority).

273 *See, e.g.*, MCGARITY, *supra* note 272, at 56–59, 111–45 (discussing several industry efforts to lobby for federal legislation allowing weaker federal regulatory regimes to preempt state common law remedies); Baker & Young, *supra* note 21, at 109–10 (discussing federal aggrandizement of power vis-à-vis state regulatory authority, often at the prompting of interest groups at the federal level); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–20 (2007); Young, *supra* note 23, at 76–77.

are less likely to encounter opposition from influential public or state interest groups.[274] Thus, powerful industries—pharmaceutical, auto, tobacco, etc.—have sought deregulatory federal legislation and broad judicial interpretations of federal preemption in their sectors.[275] Importantly, federalism scholars agree that federal preemption of state law and regulatory authority is a significant threat; wiping out entire categories of state authority hampers states' capacity to supply the regulatory deliverables that sustain citizen loyalty, which in turn endangers states' influence in the larger political system.[276]

Aside from the financial motives, some Super PAC donors appear ideologically motivated to either disregard or oppose state interests. Roughly seventy percent of Super PAC spending supports Republicans; an account of the ideological commitments of those groups might give us a rough picture of what the majority of megadonors seek.[277] With the usual caveats for assessing multimember institutions' common goals, it seems fair to say that one important commitment of many of the wealthiest and most active Super PACs is to decrease government activity generally, with a rhetorical focus on the federal government.[278] There is not, however, a corresponding commitment to increasing *state* government power—instead, the main common interest seems to be, in general, deregulating certain economic sectors.[279]

Of course, there will be some interest convergence: Private interests might favor devolving authority to states (perhaps as a second-best alternative to deregulation) or want to block federal action that states also oppose.[280] There

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274 *See* OLSON, NATIONS, *supra* note 139, at 24 (arguing that generalized interests rarely mobilize political-pressure groups because "socially heterogeneous groups . . . are less likely to agree on the exact nature of whatever collective good is at issue or on how much of it is worth buying").

275 *See* MCGARITY, *supra* note 272, at 111–51 (detailing industry lobbying for weaker federal regulatory regimes to preempt state common law remedies); Hills, *supra* note 273, at 19–20 (discussing the political incentives surrounding preemption in environmental, pension, and securities regulation).

276 *See, e.g.*, Young, *supra* note 23, at 140–45.

277 *See Fundraising and Spending by Political Leaning, 2011–12*, SUNLIGHT FOUND., http://reporting.sunlightfoundation.com/outside-spending/by-affiliation/ (last updated Apr. 11, 2013).

278 For example, Americans for Tax Reform's Grover Norquist famously pledged to shrink the federal government enough to "drown it in a bathtub." Michael Scherer, *Grover Norquist: The Soul of the New Machine*, MOTHER JONES, Jan./Feb. 2004, http://www.motherjones.com/politics/2004/01/grover-norquist-soul-new-machine.

279 *See* Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 349–55 (2010) (citing the Reagan Administration as an example of the trend that presidents have worked to deregulate on behalf of economic interests rather than a commitment to federalism); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2315–16 (2001) (arguing that Republican administrations use federalism rhetoric to advance a generally deregulatory agenda).

280 *See, e.g.*, Hills, *supra* note 273, at 38 (arguing that groups like state bar associations may prefer state-level regulatory variation to protect markets). This is sometimes called the "bootleggers and Baptists"

might also be instances in which Super PACs or other business-backed outside groups advocate states' interests out of concern for federalism as such.[281] But most often, federalism rhetoric is insincere, providing political cover rather than substantive aims[282]: "Few with influence in the political process care about promoting state power as an end in itself"[283] and "the willingness of lawmakers and interest groups to manipulate federalism in order to secure preferred substantive policies is the rule," a rule that "dates back to the Framers."[284] Industry groups seem to invoke federalism frequently because the allocation of government power often overlaps issues of government power vis-à-vis private actors;[285] but such pro-federalism rhetoric most often masks a deregulatory agenda.[286] Industry-group talk about preserving states' rights may also cloak a preference for retaining weaker state regimes rather than face new federal regulation.[287] Because interest groups have incentives to hide their motives, it is difficult here to separate the genuine from the strategic. Pro-regulation groups also use federalism arguments instrumentally as a neutral-sounding way to pursue restrictions on industry.[288] However, most groups that oppose industry are no friends to federalism—perhaps because states have

phenomenon. *See, e.g.*, Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 577 (2001); Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION, May/June 1983, at 12, 13–14.

281 The early Tea Party may have been an example. *See generally* Zietlow, *supra* note 95, at 510 ("The long-term goal of the Tea Party movement is to shrink the size and power of the federal government and thus alter our system of federalism.").

282 *See* Devins, *supra* note 95, at 134 (arguing that officials have long used federalism arguments strategically to advance other substantive policy preferences); Gilman, *supra* note 279, at 341–42 (highlighting presidents' strategic uses of federalism rhetoric); Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1059–60 (1997) (arguing that federalism rhetoric is deployed strategically by holders of diverse political views). Importantly, there is reason to think that federalism arguments are frequently insincere and strategic when deployed in and by courts as well. *See* Cross, *supra* note 82, at 1306–13.

283 Hills, *supra* note 273, at 36.

284 Devins, *supra* note 95, at 134.

285 *See* MCGARITY, *supra* note 272, at 57.

286 *See, e.g.*, *id.*; Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 113–14 (1996) (arguing that "Reagan['s] 'new federalist' rhetoric also disguised a far more complicated agenda that had as one of its primary goals radical deregulation"); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 598 & n.8 (2001) (Stevens, J., concurring in part and dissenting in part) (suggesting that the Court's renewed commitment to federalism camouflages a deregulatory agenda).

287 *See* MCGARITY, *supra* note 272, at 57; Hills, *supra* note 273, at 31 (maintaining that it would be "inconceivable that environmentalists . . . would sponsor legislation eliminating federal preemption of state environmental standards if they believed that the practical result would be more lenient state environmental standards overall").

288 *See* Devins, *supra* note 21, at 134–35; Hills, *supra* note 273, at 36 (noting some "interests disfavoring preemption do *not* favor diversity for its own sake").

historically served as the final holdouts of antiprogressive policies on race, labor, health care, immigration, and so forth.[289]

To summarize, the wealthy interests that became exponentially more powerful after *Citizens United* are most likely to ignore state interests, feign concern for federalism to advance unrelated substantive goals, or seek deregulatory federal action that directly constricts state autonomy. Their new, unlimited capacity to support federal candidates suggests that their preferences will often trump those of ordinary constituents or states qua states for officials interested in reelection.[290] Wechsler's representational safeguard would be decimated.

A related concern is that clientelism incentivizes expanding and adding complexity to federal programs so that officials can bury their service to interest-group backers beyond public scrutiny.[291] And, of course, federalism theorists have long argued that all federal expansion diminishes state autonomy somewhat by diminishing the space in which states may act without worry about conflicting federal enactments.[292]

However, it is also possible that the current high visibility of Super PACs in the ongoing public debate about the effects of *Citizens United* may have sparked voter backlash that partially explains the failures of conservative-leaning Super PACs in 2012.[293] Voters may regard Super PAC funding as a

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[289] *See* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1277–78, 1302–03 (2004) (noting this, but also that states recently have been more progressive on issues like marriage equality).

[290] Public choice theory does not involve a *causal* claim that officials are actually single-minded reelection seekers—the better descriptive account is that officials "pursue a variety of ends simultaneously, trading goals off against one another and giving no goal overriding priority." Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1287–88 (2001); *see* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 31–35 (1991). My claim is just that growing outside-group influence will tend to increase the priority of those groups' demands for officials interested in retaining office—sometimes at the expense of constituents who can provide relatively little support. *See generally* Pursley, *supra* note 64, at 534–63 (canvassing public choice theory and critiques).

[291] *See* OLSON, NATIONS, *supra* note 139, 67–74; Issacharoff, *supra* note 16, at 127–30; Jonathan S. Krasno & Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 123–24 (2003).

[292] *See, e.g.*, Young, *supra* note 56, at 1792–93.

[293] *See* Editorial, *A Landslide Loss for Big Money*, N.Y. TIMES, Nov. 11, 2012, at SR12; *supra* note 12 and accompanying text.

proxy for candidates' willingness to pander to special interests.[294] That may decrease outside-group influence or increase candidates' focus on actual constituents, but it also may heighten incentives for officials to add legislative complexity to better hide their service to outside backers—either way, it will take several cycles to know whether these are real and durable phenomena. Regardless, as national outside groups grow, so grows the risk that they will persuade state-protective groups to nationalize their priorities.[295] In 2010 and 2012, Super PACs and other outside groups poured millions of dollars into state races.[296] Even if state-interest advocates maintain some measure of influence over national candidates, Wechsler's mechanism is nevertheless undermined if *state-level* stakeholders stop prioritizing the institutional interests of state governments.[297]

B. Political Parties

On Kramer's account, political parties are an important nonjudicial safeguard for federalism—they serve as conduits through which federal and state officials form durable relationships of interdependence that benefit states in the federal policymaking process.[298] Although the parties had to adapt to a changing campaign finance environment—particularly BCRA's soft-money ban—they grew stronger between *Buckley* and *Citizens United*.[299] *Citizens United* and its progeny, however, pose a multifaceted threat to this party-based model of political federalism.[300] Put generally, Super PACs' and other outside groups' growing influence in federal elections positions them to compete with the major political parties for influence over candidates, elected officials, and

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294 *See* Benjamin Hart, *Super PAC Backlash: Washington Post/ABC News Poll Says 69% of Voters Want Groups Outlawed*, HUFFINGTON POST (Mar. 13, 2012, 3:31 PM), http://www.huffingtonpost.com/2012/03/13/super-pac-backlash-poll_n_1342055.html.

295 *See* Young, *supra* note 23, at 84–85.

296 *See, e.g.*, Hirschkorn & Cordes, *supra* note 266; Kroll, *supra* note 266.

297 *See infra* notes 369–71 and accompanying text.

298 *See* Kramer, *supra* note 24, at 276–87; *supra* notes 99–102 and accompanying text.

299 *See* Briffault, *supra* note 135, at 626–27 (discussing party adaptation to changing campaign finance restrictions and general increasing strength after *Buckley*); sources cited *infra* notes 322–23 (highlighting party adaptation and renewed strength, particularly in hard-money fundraising, despite the BCRA's ban on soft money).

300 The connection between campaign finance and parties' federalism function is rarely examined. *See, e.g.*, Frymer & Yoon, *supra* note 21, at 980 ("Of most consequence for the safeguards position, parties have become increasingly centralized organizations, with national elites playing a critical role in driving both fundraising and the formulation of party agendas."); A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 793 (1985) ("[There] has been a palpable decline in the 'political' safeguards [of federalism]. Political parties, especially at the state level, no longer are the force they once were." (footnote omitted)).

thus government action. Such groups are sufficiently different from parties that they will not serve state interests in the same way. Perhaps more important, the growth of outside spending after *Citizens United* has already begun to undermine *state* party committees.[301] And state parties are crucial communicators of state interests in larger party networks.[302] Super PAC politics threaten to disrupt parties' pro-federalism functions by diminishing both federal candidates' dependence on parties and state officials' influence within party networks.

A robust literature characterizes parties as important mediating institutions in pluralistic polities—among other things, parties mobilize voters, build coalitions among constituencies with varying priorities, connect candidates with officeholders and elites, and refine policy ideas through a process of internal deliberation.[303] Cultivating the variety of interests needed to form a winning coalition forces parties toward moderate policy commitments.[304] Strong parties are arguably important for democratic accountability because, "[i]n order to hold the government accountable, voters need to face clear, programmatic choices" of the kind that parties, with unifying policy programs and ideological agendas, are well-situated to provide across various elections in a multilevel system.[305] And parties are undoubtedly significant campaign finance institutions, providing candidates with substantial campaign resources

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[301] See *infra* notes 352–57 and accompanying text (discussing state parties' increasing weakness).

[302] *See* Kramer, *supra* note 24, at 282; Kramer, *supra* note 90, at 1538 (arguing that while American parties are increasingly centralized in general, state and local party committees continue to play an important role in Kramer's party safeguards model). *See generally* John E. Chubb, *Federalism and the Bias for Centralization*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 273 (John E. Chubb & Paul E. Peterson eds., 1985) (describing the general trend toward centralization in American government).

[303] *See generally* AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE 155–63 (1954) (noting the then-current decline of American parties but emphasizing the positive contribution strong parties can make to government functioning); Comm. on Political Parties, Am. Political Sci. Ass'n, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. (SUPPLEMENT) 1, 45 (1950) (emphasizing the value of strong, disciplined parties for effective governance). There are numerous theoretical accounts of parties, some of which differ on this score. *See generally* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000) (discussing theoretical paradigms of party power and function).

[304] *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 674–75 (1998); Raymond J. La Raja, *Breaking Up the Party: How* McConnell *Downsizes Partisan Campaigns*, 3 ELECTION L.J. 271, 271–72 (2004); Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CALIF. L. REV. 373, 375–78 (2011); *see also* E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 85 (1942) (noting that "[a] large party must be supported by a great variety of interests . . . held together by compromise and concession").

[305] Ansolabehere & Snyder, *supra* note 174, at 599–600, 602, 608 (2000) (noting that incumbents have significant fundraising advantages).

and, in particular, aiding challengers in overcoming incumbents' advantages.[306] These effects and the discipline strong parties impose on their members make parties, in principle, "a counterweight to the many special interests that may chip away at the public good behind legislation."[307]

Before FECA, the major parties had lost much of their influence—some viewed the condition of state parties in particular as dangerous for federalism.[308] Between FECA and *Citizens United*, however, parties grew stronger and gained certain competitive advantages over outside groups[309]: Parties still can collect larger contributions than can candidates or PACs—although they are capped, unlike donations to Super PACs.[310] Only parties can make both unlimited independent expenditures and large hard-money expenditures in coordination with federal candidates' campaigns.[311] Before the BCRA, parties could use soft money to "hire staff, acquire office space, develop direct mail capability, run polling and issue research operations, acquire data processing equipment, and create and improve facilities for mass media communications"—in short, to develop the infrastructure required to function as sophisticated electoral players.[312] Soft money increased coordination between national and state party organizations—state parties could use more soft money than could national committees for activities

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306 *See* McConnell v. FEC, 540 U.S. 93, 249–50 (2003) (Scalia, J., concurring in part and dissenting in part) (criticizing the existing campaign finance law's bias toward incumbents), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 156–57 (2002) (proposing reforms that would counterbalance incumbents' existing campaign-finance advantages over challengers); PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM 6–9, 89–103 (2009) (explaining that incumbents have inherent campaign finance advantages over challengers and that, after certain legal reforms, parties will be well situated to provide significant institutional and financial support for challengers).

307 Ansolabehere & Snyder, *supra* note 174, at 599.

308 *See* DAVID S. BRODER, THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA, at xvi, xxiii, 251, 263–64 (1971) (describing American political parties in the 1960s as weak and dysfunctional); WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 91 (1964) (emphasizing American parties' weakness in the 1950s and early 1960s); sources cited *infra* note 352 (describing federalism concerns associated with state-party weakness); *see also* CORNELIUS P. COTTER ET AL., PARTY ORGANIZATIONS IN AMERICAN POLITICS 62 (1984) (noting reinvigoration after FECA).

309 *See* Briffault, *supra* note 135, at 624–27.

310 *See* 2 U.S.C. § 441a(a)(1)(B)–(C) (2012).

311 *See id.* § 441a(a)(7)(B)(i) (establishing that coordinated expenditures by nonparties are deemed contributions); *id.* § 441a(d) (regulating coordinated expenditures); *McConnell*, 540 U.S. at 213–19 (invalidating the BCRA provision forcing parties to choose independent or coordinate expenditures); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 608–14 (1996) (concluding that the FECA provision regulating coordinated expenditures does not apply to independent expenditures).

312 Briffault, *supra* note 135, at 629.

benefiting both state and federal campaigns—and provided state parties with enormous resources to improve their infrastructures.[313] While large soft-money donors did seek special access and influence,[314] expanding party resources, including soft money, also created stronger, more disciplined parties—and history suggests that, on balance, "the influence of money on policy is diminished when candidates and parties have ample access to fundraising."[315] Importantly, soft money had to flow *though the parties*, giving them control over most resources that wealthy donors wanted to funnel to candidates and thus interposing their moderating influence on those donors' demands.[316]

The soft-money ban, by contrast, generated competition with the parties as large donors had to spend their political money, if at all, independently or through intermediaries like 527s.[317] Contrary to some predictions,[318] however, the parties adapted to maintain their resources and influence by dramatically increasing their hard-money fundraising.[319] This also moved parties away from overreliance on large donors, reducing the extent to which they served as conduits for special-interest influence.[320] But political money flows to the least regulated channel, and although large donors had incentives to give soft money to parties rather than outside groups permitted to make only independent expenditures,[321] the BCRA redirected much of that money to nonparty

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313 *Id.* at 626–29.

314 *See McConnell*, 540 U.S. at 150–51.

315 Issacharoff, *supra* note 16, at 137; *accord* Ansolabehere & Snyder, *supra* note 174, at 599–600.

316 *See* sources cited *supra* note 304.

317 *See supra* notes 212–22 and accompanying text.

318 *See, e.g.*, Ansolabehere & Snyder, *supra* note 174, at 601.

319 *See* RAYMOND J. LA RAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM (2008) (describing adaptability); Gary C. Jacobson, *A Collective Dilemma Solved: The Distribution of Party Campaign Resources in the 2006 and 2008 Congressional Elections*, 9 ELECTION L.J. 381, 384–85 (2010); Michael J. Malbin, *Political Parties Under the Post-*McConnell *Bipartisan Campaign Reform Act*, 3 ELECTION L.J. 177, 184 (2004) (noting that parties may offset lost soft money with hard money); *see also* Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 160 n.5 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3544 (2010) (reaffirming the BCRA's soft-money ban after *Citizens United*); *cf.* Richard Briffault, *Life of the Parties? Money, Politics, and Campaign Finance Reform*, 8 ELECTION L.J. 207, 212 (2009) (reviewing LA RAJA, *supra*) (worrying that parties might nevertheless recede).

320 *See* McConnell v. FEC, 540 U.S. 93, 150–51 (2003) (describing concerns about large soft-money donors), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); Ansolabehere & Snyder, *supra* note 174, at 601. *But see* John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 615–17 (2005) (noting parties' new hard-money "bundling" practices might increase special-interest influence).

321 *See* Herbert E. Alexander, *The Case FOR Soft Money*, CAMPAIGNS & ELECTIONS, July–Aug. 1986, at 26, 26–28, *available at* http://cfinst.org/pdf/HEA/227_caseFORsoftmoney.pdf.

entities.[322] After *Citizens United*, Super PACs are the primary beneficiaries of the soft-money ban, and this deluge of resources increases outside groups' capacity to support candidates financially and thus compete with parties for candidate loyalty.[323] This dynamic does not necessarily reduce *party* resources if their hard-money fundraising remains strong, but it might eventually if the resource pool is finite. Either effect—increased competition or decreased resources—may undermine traditional party characteristics with implications for political federalism.

If resources shift *away* from parties as well as toward Super PACs, then parties' relative influence declines, undermining their capacity to foster electoral competition and accountability, policy discipline, etc.—all to states' political disadvantage. Party support for challengers, for example, can negate some of the advantages of incumbency and thus foster the electoral competition that reinforces democratic accountability.[324] Private interest groups, by contrast, tend to support incumbents "as an investment in politics, with some expectation of a return for their donation"—incumbents therefore need less party money than challengers.[325] Decreased support for challengers likely means more incumbent victories and the corresponding reinforcement of special interest influence.[326] Resource loss also may damage party cohesiveness—with less electoral support to spread around, the parties' capacity to shepherd initiatives through the federal policymaking process likely would be diminished.[327] This could undermine the states' party-based influence—especially if party discipline is replaced by special-interest influence favoring agendas indifferent to state interests.[328] These effects exacerbate two federalism problems. First, the odds are good that the empowered interest groups will press for centralizing or generally deregulatory

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[322] *See* Briffault, *supra* note 214, at 962–65; Richard L. Hasen, *Super-Soft Money*, SLATE (Oct. 25, 2011, 2:01 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_united_how_justice_kennedy_has_paved_the_way_for_the_re.html; *see also* Issacharoff & Karlan, *supra* note 10, at 1715–16 (noting that political money finds the least regulated channel).

[323] *See* Briffault, *supra* note 319, at 212.

[324] *See* Ansolabehere & Snyder, *supra* note 174, at 607–08.

[325] *See id.* at 609–10.

[326] *See, e.g.*, DAN CLAWSON, ALAN NEUSTADTL & DENISE SCOTT, MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE (1992); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990) (documenting the impact of campaign finance on legislative action); *see also* Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1057–60 (1986).

[327] *See* Ansolabehere & Snyder, *supra* note 174, at 607–08.

[328] *See* Frymer & Yoon, *supra* note 21, at 1011 (arguing that interest-group influence displaces state influence and tends to favor interstate priorities).

federal action.[329] Second, incumbents may be systematically biased against state preferences—retaining *federal* office often will require federal aggrandizement, and incumbents will have mastered aspects of that process.[330]

Even if party resources remain constant, outside groups' growing capacity to function as alternatives to parties is problematic in itself—if candidates perceive no disadvantage in switching their loyalties from parties to Super PACs, then parties, and their federalism benefits, still may be eroded.[331] Some will argue that the 2012 election shows that parties have already adapted to Super PACs.[332] But the Super PAC threat is evolving as well. Super PACs "run by party regulars [are beginning to] . . . look, smell, and act a lot like political party organizations."[333] Former party officials working within Super PACs may act as conduits for some party control over their activities.[334] Super PACs' dependence on megadonors, however, makes it more likely that those donors' narrower agendas will take priority.[335] The 2012 Republican primaries suggest that Super PACs coordinated, if at all, with donors and candidates—not parties.[336] As Super PAC support for candidates increases, candidates will increasingly have incentives to prioritize Super PAC agendas over party objectives.

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329 *See* David Durenberger, *View from the Commission*, INTERGOVERNMENTAL PERSP., Fall 1984, at 2, 2 ("Lobbies . . . would find it immeasurably more difficult to press their categorical agendas under a truly decentralized federal system . . . . [and thus would] exert strong opposition to new decentralizing schemes."); Frymer & Yoon, *supra* note 21, at 1011 (noting that politically invested private interests are "predominantly corporate and free market" oriented).

330 Incumbent federalism hawks also might be entrenched by a rollback of party resources, but there are few such officials. On the whole this seems net negative.

331 *See, e.g.*, Timothy Conlan, Ann Martino & Robert Dilger, *State Parties in the 1980s: Adaptation, Resurgence and Continuing Constraints*, INTERGOVERNMENTAL PERSP., Fall 1984, at 6, 23.

332 *See, e.g.*, David Schleicher, *The Party Is Not Over: Of Super PACs, Saddlebags, and the Survival of Parties Post*–Citizens United, CONCURRING OPINIONS (Nov. 14, 2012, 9:07 AM), http://www.concurringopinions.com/archives/2012/11/the-party-is-not-over-of-superpacs-saddlebags-and-the-survival-of-the-parties-post-citizens-united.html.

333 *Id.*; *see, e.g.*, Thomas B. Edsall, *Billionaires Going Rogue*, N.Y. TIMES, Oct. 28, 2012, http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/?page wanted=print (describing how Super PACs create an "independent source of contracts for the community of political professionals").

334 *See* sources cited *supra* notes 231–34.

335 *See* sources cited *supra* note 3.

336 *See, e.g.*, Joe Garofoli, *Gingrich's Failed Run Shows Super PACs' Power*, SFGATE (May 3, 2012, 4:00 AM), http://www.sfgate.com/politics/joegarofoli/article/Gingrich-s-failed-run-shows-super-PACs-power-3530619.php (describing how a Super PAC propped up a primary candidate and weakened the frontrunner with attack ads); Bill Schneider, *Super PACs Are Ruining Republicans*, POLITICO (Mar. 5, 2012, 9:29 PM), http://www.politico.com/news/stories/0312/73630.html#ixzz1oJwLkqZj (describing similar Super PAC campaign tactics).

Party structure can only affect the federal policy process as long as parties wield significant political influence. Outside spending entities are rapidly gaining on parties financially, in part because they can more easily court large donors; party leaders, by contrast, must adopt moderate positions and exercise agenda control to unite the many diffuse constituencies needed to elect large slates of candidates.[337] For now, outside groups' issue profiles can be narrowly tailored to the preferences of major donors. If outside groups gain the capacity to provide primary or total financial support for a winning federal campaign, they could eliminate financial incentives that might otherwise motivate candidates to stay loyal to parties.[338] Of course candidates will, for the foreseeable future, still need to be affiliated with a major party, if for no other reason than to carry a party brand with which voters are familiar.[339] But Kramer's safeguard requires their dependence on and substantial *participation* in party networks, and "both national and state parties remain marginal in relation to the candidates who raise money independently."[340] Candidates nominally affiliated with, but minimally dependent on, parties seem less likely to take seriously the suggestions of state-minded party members.

Outside groups are also developing the capacity to provide party-like services aside from financial support. Parties offer candidates access to peer networks and established federal officials for information and endorsements,[341] state and local volunteers and organizations for voter outreach and campaign events, successful strategists and pollsters, and public signaling benefits of

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337 *See* sources cited *supra* note 304.

338 *See* Briffault, *supra* note 319, at 212 (noting the increasing competition between interest groups and parties for national candidates' loyalties).

339 The history of third-party and independent candidates' electoral success in this country is not encouraging for those considering abandoning the major parties entirely. *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 394–408 (discussing the implications of party brand familiarity for efforts to increase voters' familiarity with issues). *See generally* Shigeo Hirano & James M. Snyder, Jr., *The Decline of Third-Party Voting in the United States*, 69 J. POL. 1 (2007) (emphasizing the general historical dominance of major parties and observing, for example, that no third-party candidate received even ten percent of the vote for House, Senate, or Governor in any state from 1940–1970).

340 Frymer & Yoon, *supra* note 21, at 995; *see also id.* at 979–80.

341 Super PACs increasingly offer large donors the sort of special access benefits—for example, by making candidates and officials available at fundraisers—that once were the exclusive province of parties or campaigns. *See, e.g.*, Sheelah Kolhatkar, *Inside Karl Rove's Billionaire Fundraiser*, BLOOMBERG BUSINESSWEEK (Aug. 31, 2012), http://www.businessweek.com/articles/2012-08-31/exclusive-inside-karl-roves-billionaire-fundraiser; Jeff Mason, *In Shift, Obama Campaign to Support Super PAC Fundraiser*, REUTERS (Feb. 7, 2012), http://www.reuters.com/assets/print?aid=USTRE81617U20120207; Kenneth P. Vogel, *Rick Santorum Speaks at Super PAC Fundraiser*, POLITICO (Feb. 24, 2012, 3:46 PM), http://dyn.politico.com/printstory.cfm?uuid=955E14F6-3133-47B3-9963-5E2D4E7F01B4.

party brands.[342] American Crossroads, for example, provided some ground-game support for its candidates in 2012; outside groups are also using their financial advantage to recruit top political professionals.[343] Super PACs and nonprofits are expanding their slates: American Crossroads and Crossroads GPS spent on thirty-one federal races in 2012, and the U.S. Chamber of Commerce spent on at least thirty-nine races, to cite just two examples.[344] Large majorities of Republican congressional candidates have endorsed Americans for Tax Reform's antitax pledge; which in turn shaped recent fiscal debates in Congress.[345] As their candidate slates expand, they will offer greater networking opportunities and eventually, with their narrower agendas and smaller constituencies, programmatic discipline to help candidates claim reelection-ensuring policy victories at discounted transaction costs.[346] These dynamics are interdependent: As outside groups become more party-like in the services they provide, they will attract more candidates.

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342 *See* Jonathan Woon & Jeremy C. Pope, *Made in Congress? Testing the Electoral Implications of Party Ideological Brand Names*, 70 J. POL. 823, 825 (2008) (describing party brands' functioning as voter-accessible proxies for candidates' policy positions); James Hohmann, *RNC Steps Up Voter Outreach*, POLITICO (Sept. 7, 2012, 7:59 PM), http://dyn.politico.com/printstory.cfm?uuid=88F63BC7-BF49-413E-A8EE-744C7E38B75E (highlighting Republican party's ground-game services for 2012 Romney presidential campaign); *Party Services*, ARIZ. DEMOCRATIC PARTY, http://azdem.org/about/party_services/ (last visited Mar. 8, 2014) (offering messaging, strategic outreach and fundraising services). *See generally* Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653 (2000) (demonstrating that ground game increases turnout).

343 *See* Scott Conroy, *Northern Virginia Edge Could Be Pivotal for Obama*, REAL CLEAR POL. (June 13, 2012), http://www.realclearpolitics.com/articles/2012/06/13/northern_virginia_edge_could_be_pivotal_for_obama_114458-full.html (reporting that the Romney campaign "largely outsourced its Virginia ground operation."); sources cited *supra* notes 231–34.

344 *See Follow the Unlimited Money: American Crossroads, 2012 Cycle*, SUNLIGHT FOUND., http://reporting.sunlightfoundation.com/outside-spending/committee/american-crossroads/C00487363 (last updated April 11, 2013); *Follow the Unlimited Money: Crossroads Grassroots Policy Strategies, 2012 Cycle*, SUNLIGHT FOUND., http://reporting.sunlightfoundation.com/outside-spending-2012/committee/crossroads-grassroots-policy-strategies/C90011719 (last updated April 11, 2013); *Follow the Unlimited Money: U.S. Chamber of Commerce, 2012 Cycle*, SUNLIGHT FOUND., http://reporting.sunlightfoundation.com/outside-spending/committee/us-chamber-of-commerce/C90013145 (last updated April 11, 2013).

345 Americans for Tax Reform (ATR), a 501(c)(4) nonprofit, made over $15 million in independent expenditures in 2012. *See About Americans for Tax Reform*, AMS. FOR TAX REFORM, http://www.atr.org/about (last visited Mar. 8, 2014); *Follow the Unlimited Money: Americans for Tax Reform, 2012 Cycle*, SUNLIGHT FOUND., http://reporting.sunlightfoundation.com/outside-spending-2012/committee/americans-for-tax-reform/C90011289 (last updated April 11, 2013); *see also* Lee Fang, *The Truth About Grover Norquist*, NATION INST. (Jan. 4, 2013), http://www.nationinstitute.org/featuredwork/fellows/3099 ("Norquist's influence actually derives from his alliances with powerful donors."); Jeremy W. Peters, *For Tax Pledge and Its Author, a Test of Time*, N.Y. TIMES, Nov. 19, 2012, http://www.nytimes.com/2012/11/20/us/politics/grover-norquist-author-of-antitax-pledge-faces-big-test.html?_r=1&&pagewanted=print (reporting that 250 signing members of Congress pledged never to vote for a tax increase).

346 *See infra* notes 344–45 and accompanying text.

State party organizations were considered central to federalism even before Kramer wrote, "Strong and vigorous state parties historically have provided an important channel of intergovernmental communication and state influence in Washington."[347] Even as state parties respond to the nationalization of voters' interests by increasing their focus on national matters[348] and correspondingly deprioritizing state and local issues, they remain central to the party safeguard mechanism in two significant senses. First, they provide forums for those invested in state issues to form relationships and collaborate, and during federal elections, state parties connect these state-focused networks to the national parties' parallel networks of candidates, operatives, and officials.[349] Second, state parties still provide to federal candidates staff and volunteers with local expertise for voter outreach and mobilization, and deliver state and local officials to endorse, raise money, provide information about voters' localized concerns, and otherwise increase federal candidates' appeal to the subnational electorates they must turn out to win.[350] These "blood and muscle" resources—which national campaigns would have difficulty replicating without state parties' established organizations—are important regardless of voters' substantive concerns and contribute to the dependence of federal party operators on state officials that undergirds Kramer's safeguard.[351]

State parties, with their national counterparts, declined before FECA; but while FECA treated them as equivalent to PACs, state parties nevertheless grew stronger and increased their coordination with national parties in its wake.[352] The soft-money ban dealt a blow to this burgeoning coordination and

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347 Conlan et al., *supra* note 331, at 6.

348 *See* Elmendorf & Schleicher, *supra* note 339.

349 *See* Kramer, *supra* note 24, at 278–83.

350 *See* Conlan et al., *supra* note 331, at 6 (suggesting state parties maintain "significant organizational presence in their states"); La Raja, *supra* note 304, at 273 (noting parties' "coordinated get-out-the-vote programs with state affiliates"); Sarah M. Morehouse & Malcolm E. Jewell, State Parties Adjust to BCRA, Paper Presentation at the University of Akron Bliss Institute of Applied Politics Conference: State of the Parties: 2004 and Beyond 2–3 (Oct. 5–7, 2005), http://www.uakron.edu/bliss/docs/state-of-the-parties-documents/Morehouse.Jewell.pdf.

351 Contrary to one critique, *see* Frymer & Yoon, *supra* note 21, at 1011–14, Kramer's account does not require that state officials exercise *control* over national-party operations. It requires *networks* that transmit state interests and create incentives for federal officials to listen even if the party generally focuses on national issues. *See* Kramer, *supra* note 24, at 278–83.

352 *See* TODD DONOVAN, CHRISTOPHER Z. MOONEY & DANIEL A. SMITH, STATE AND LOCAL POLITICS: INSTITUTIONS AND REFORM 170–71 (2d ed. 2011); Paul R. Abramson et al., *Challenges to the American Two-Party System: Evidence from the 1968, 1980, 1992, and 1996 Presidential Elections*, 53 POL. RES. Q. 495 (2000); Briffault, *supra* note 135, at 629; Cynthia C. Colella, *Intergovernmental Aspects of FECA: State Parties and Campaign Finance*, INTERGOVERNMENTAL PERSP., Fall 1984, at 14 (noting that state and local committees are subject to FECA treatment); Conlan et al., *supra* note 331, at 6–8; Kramer, *supra* note 24

diminished state parties' autonomous fundraising capacity.[353] To maintain freedom to focus on subnational issues, state parties need to generate resources on their own, just as they need strong organizations providing services for federal candidates to generate clout and leverage in party networks.[354] But the BCRA functionally barred state parties from using soft money in ways useful to national parties.[355] This restriction reduced both coordination and fundraising—it made hard money more precious, diminishing national-party incentives to fund state-party-building activities; and it increased regulatory barriers to state-party contributions to federal campaigns.[356] The nationalization of politics and voter interests has also hampered state-party fundraising.[357] State-party fundraising recovered somewhat in the years after the BCRA and, contrary to some claims, issue nationalization has not turned state parties into mere arms of their national counterparts.[358]

Nevertheless, national parties still have incentives to coordinate with state parties. Some state laws allow state parties to tap funds not open to national parties for use in state voter outreach and mobilization.[359] Building an effective nationwide organization "requires either an immense amount of money or the support from many state leaders who can assist by offering the aid of their existing party organizations."[360] Banning soft money *created* some incentives for national parties coping with their own resource shortfalls to seek state-party organizational assistance, and at the same time placed local organizations more squarely under state-party control.[361]

(writing at the height of the soft-money era); Krasno & Sorauf, *supra* note 291, at 138–39 (attributing state-party revitalization in part to soft money); La Raja, *supra* note 304, at 272; Sara M. Morehouse, State Parties: Independent Partners: The Money Relationship, Paper Presentation at the 2000 Annual Meeting of the American Political Science Association 3 (Aug. 31–Sept. 3, 2000), http://www.cfinst.org/parties/papers/morehouse_stateparties.pdf; sources cited *supra* note 308.

353 *See* La Raja, *supra* note 304.

354 *See* Conlan et al., *supra* note 331, at 7.

355 *See supra* notes 183–87 and accompanying text. The BCRA exempts from soft-money prohibitions donations from individuals to state or local party committees, up to $10,000 per year, for party-building activity without specific federal-candidate identification. *See* 2 U.S.C. § 441i(b)(2) (2012).

356 *See* McConnell v. FEC, 540 U.S. 93, 122–26 (2003) (discussing the transfer of soft money to state parties), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); Briffault, *supra* note 135, at 629; La Raja, *supra* note 304, at 272; Persily, *supra* note 183.

357 *See, e.g.*, Frymer & Yoon, *supra* note 21, at 992.

358 *Compare id.*, *with* Morehouse & Jewell, *supra* note 350, at 2–3.

359 *See, e.g.*, *State Limits on Contributions to Candidates: 2011–2012 Election Cycle*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/Portals/1/documents/legismgt/Limits_ to_Candidates_2011-2012.pdf (last updated Sept. 30, 2011) (showing twelve states with no individual contribution limit).

360 Frymer & Yoon, *supra* note 21, at 994.

361 *See id.* at 993–94 (describing how the BCRA increased state-party influence).

State parties—with their blood-and-muscle resources—are best situated to conduct these important ground-game operations. Building quality organizations requires familiarity with local players and priorities. This is particularly important in our system of front-loaded presidential primaries that "privilege[] candidates who have large campaigns that are organized in many different states at once"—candidates who succeed do so "in no small part due to the efforts of state leaders around the country."[362] And in 2012, much state-party spending was dedicated to organizing, outreach, and turnout activities.[363] National parties thus still have incentives to provide deliverables that matter to state-party officials in exchange for ground-game assistance.

These and all other party mechanisms are directly threatened by the growth of Super PACs and similar entities. National candidates now have access to unlimited resources, so they are no longer necessarily dependent on state party organizations. Super PACs are beginning to replicate state parties' organizational achievements—indeed, 527 organizations ran some voter turnout operations as early as 2004.[364] The widespread view that the ground game was critical to President Obama's victory will motivate Super PACs to intensify efforts to develop capacity to provide these services.[365] Candidates also may, with unlimited outside funding and the longstanding belief that television ads are the most effective electioneering tools, opt for spending on air wars—a Super PAC specialty—rather than ground-game activities. Both dynamics diminish state-party incentives to invest in organizations, and eventually might give Super PACs a competitive advantage. State parties, because of their smaller resource pools, lower visibility, and financial

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362 *Id.* at 993.

363 *See, e.g.*, Paul Blumenthal, *Obama Ground Game: State Parties Flush with Cash in Swing States*, HUFFINGTON POST (Oct. 24, 2012, 5:33 PM), http://www.huffingtonpost.com/2012/10/24/obama-ground-game-swing-states_n_2009600.html?view=print&comm_ref=false. These and other electoral functions that preserve state-party significance—e.g., presidential primaries—are increasingly focused on early primary states and general-election battleground states. *See, e.g.*, Frymer & Yoon, *supra* note 21, at 992–94 (discussing national parties' increasing focus on early primary states). This may create another federalism problem by skewing party networks in favor of powerful states. Inequality of state influence in national politics may undermine federalism's durability. *See* Baker & Young, *supra* note 21, at 115–16; Gardner & Abad I Ninet, *supra* note 97, at 491. These "swing-state federalism" problems are largely unexplored and I will return to them in future work.

364 Briffault, *supra* note 214, at 955.

365 *See A Landslide Loss for Big Money*, *supra* note 293 ("Independent groups . . . may begin thinking about how better to use their money to target voters and build grass-roots efforts . . . ."); Conroy, *supra* note 343 (reporting outsourcing turnout in Virginia in 2012); Rebecca Sinderbrand, *Analysis: Obama Won with a Better Ground Game*, CNN, http://www.cnn.com/2012/11/07/politics/analysis-why-obama-won/index.html (last updated Nov. 7, 2012, 7:00 AM).

vulnerability after the BCRA, have worried about competition from nonparty groups since the advent of PACs.[366] Super PACs, with their unlimited fundraising potential, have even greater capacity to provide donors and candidates with attractive alternatives to state parties.[367] If they develop the capacity to compete on the services state parties are structured to offer as their best products, there is no obvious way for state parties to adapt and maintain their relevance in federal elections. Increased Super PAC competition in federal elections also motivates national parties to further centralize because, to compete, national parties will need to retain more of the hard money they might otherwise send to state parties and to further nationalize and professionalize their ranks, pushing state operators out of party networks.[368] State-party fundraising is down significantly since *Citizens United*.[369]

Finally, Super PACs have begun intervening in state and local elections, where they can get significantly more value for every dollar and readily outmatch opposing candidates and subnational party organizations.[370] Super PAC competition with state parties in state races—either for candidate clients or donors—exacerbates the incentive problems that arose from the soft-money ban. Their status as unregulated alternatives to state parties gives candidates and donors a reason to shift their allegiance. Resulting decreases in state-party resources reduce state-party services, driving candidates away and further discouraging national-party collaboration and resource transfers. State parties will have to expend more resources on state contests, diminishing their capacity to participate in federal elections and thus to earn consideration of state interests within party networks.

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366 *See, e.g.*, Conlan et al., *supra* note 331, at 23; Durenberger, *supra* note 329, at 31 (emphasizing state parties' problems with outside-group competition).

367 *See supra* notes 146–49 and accompanying text (discussing PACs and legal restrictions on PAC fundraising).

368 *See* Frymer & Yoon, *supra* note 21, at 988–89, 997–1000 (noting this effect of PAC and interest-group competition with parties in the pre-BCRA era).

369 *See* Neil Reiff, *State and Local Party Committees: An Endangered Species?*, CAMPAIGNS & ELECTIONS, July/Aug. 2012, at 12, 13 ("[T]he average Democratic state party committee raised less than $500,000 . . . for the entire 2011 calendar year."). Swing-state parties raise money more successfully in election years—but much of it is sent by national parties or raised by national candidates. *See, e.g.*, Blumenthal, *supra* note 363.

370 *See, e.g.*, David Nyczepir, *The Super PAC Onslaught: Is Your Local Campaign Next?*, CAMPAIGNS & ELECTIONS, July/Aug. 2012, at 47, 47–49; Nicholas Confessore, *Missouri Political Donor Thrives with No Limits*, N.Y. TIMES, Oct. 18, 2012, http://www.nytimes.com/2012/10/19/us/politics/missouri-political-donor-thrives-with-no-limits-giving.html?pagewanted=all&_r=0&pagewanted=print (describing Super PAC intervention in state races); Kroll, *supra* note 266.

There are reasons to doubt, however, that Super PACs will become moderating entities. Candidates and parties increasingly depend on Super PACs to remain competitive in elections; Super PACs' capacity to deploy unlimited resources in support of a candidate makes them more valuable than other, smaller-scale contributors that may form part of the candidate's or party's coalition.[371] Super PACs' capacity to replace smaller-donor support that candidates may lose by taking certain policy positions, and Super PACs' increasing value as political supporters together suggest that candidates and parties will be increasingly likely to subordinate smaller donors' preferences to the preferences of Super PACs and their donors. And, Super PACs are overwhelmingly dependent on wealthy individual donors[372] who may give in larger amounts to outside groups than they do to candidates or parties *because* they want to press an ideological position.[373] Super PACs' financial incentives to fulfill their ideological commitments suggest that they will remain polarizing forces. The same incentives should prevent Super PACs that expand to incorporate state and local ground-game operations and staff from becoming functional conduits for the transmission of state-government preferences—large donors' desires, often for centralization or deregulation, will take priority. While a Super PAC with an ideological commitment to federalism might reinforce the political safeguards, no such organization presently exists and, even if it did, federalism rhetoric is most often insincerely deployed to further substantive policy objectives that may actually conflict with state interests.[374] This creates the worst of both worlds: Strong, broad-based organizations with sufficiently large delegations of "client officials" to enact controversial legislation but with sufficiently strong ideological discipline to forestall the moderation of conventional parties. Reproduction of state-protective mechanisms within Super PACs therefore seems unlikely—certainly so in the short term.

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371 *See* Nicholas Confessore, *G.O.P. Campaigns Grow More Dependent on "Super PAC" Aid*, N.Y. TIMES, Feb. 20, 2012, http://www.nytimes.com/2012/02/21/us/politics/super-pac-role-grows-for-republican-campaigns.html?pagewanted=print; Confessore, *supra* note 18 (noting that despite objections to *Citizens United* and Super PACs, President Obama and Democratic candidates in 2012 resorted to Super PACs "to be financially competitive").

372 *See* Bowie & Lioz, *supra* note 3 (discussing megadonors).

373 *Cf.* Briffault, *supra* note 214, at 964–65 (suggesting that wealthy individual donors to outside political groups are more likely to be motivated by ideology than corporations).

374 *See* Devins, *supra* note 95, at 131–34.

C. The Intergovernmental Lobby

The intergovernmental lobby is composed of multiple organizations—the National Governors Association (NGA), National Conference of State Legislators, National League of Cities, National Association of Attorneys General and U.S. Conference of Mayors are the most prominent,[375] but there are many others.[376] The perceived failure of traditional political safeguards and federal-government expansion were among the reasons for their formation.[377] Beyond their primary function—lobbying federal officials on behalf of state governments[378]—these groups facilitate an exchange of ideas among states and with federal officials, disseminate information on federalism issues, and, like political parties, link the fates of state and federal officials.[379] The NGA often is a lead group for the others; and while groups' interests sometimes diverge—on water issues, for example, which disproportionately affect western states, or oil and gas policy, which affects primarily petrochemical producing states—they have reached consensuses when federal action threatened universal state interests such as avoiding broad preemption or preserving grants-in-aid.[380] Most federal action that impacts states prompts intervention by at least some groups.[381] We need not resolve the academic debate over lobbyists' actual influence on legislative outcomes—here, assume that intergovernmental lobby

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375 *See* NUGENT, *supra* note 29, at 119; Peabody & Nugent, *supra* note 70, at 51 n.184.

376 *See* Peabody & Nugent, *supra* note 70, at 51 n.184 (noting "several hundred"). *See generally* Judith Resnik, *The Internationalism of American Federalism: Missouri* and *Holland*, 73 MO. L. REV. 1105 (2008) (listing many intergovernmental lobbying groups); Heather M. Creek, Fifty Interest Groups: The U.S. States and the Intergovernmental Lobby, Paper Presentation at 2012 State Politics and Policy Conference (Feb. 17, 2012), http://2012sppconference.blogs.rice.edu/files/2012/02/Fifty-Interest-Groups-SPPC-Creek.pdf (listing additional intergovernmental lobbying groups).

377 *See* R. Allen Hays, *Intergovernmental Lobbying: Toward an Understanding of Issue Priorities*, 44 W. POL. Q. 1081, 1081 (1991) (describing the expansion of federal policymaking into nearly every area, including those traditionally regulated by states); Peabody & Nugent, *supra* note 70, at 55 (highlighting process failures).

378 *See* NUGENT, *supra* note 29, at 7–10. *See generally* ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM (1995) (analyzing the development of intergovernmental lobbying); DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING (1974) (discussing the intergovernmental lobby's attempt to influence federal policy and the degree to which it has succeeded).

379 *See* Timothy J. Conlan, Robert L. Dudley & Joel F. Clark, *Taking On the World: The International Activities of American State Legislatures*, PUBLIUS, Summer 2004, at 183, 196; Resnik, *supra* note 376, at 1131; *cf.* NUGENT, *supra* note 117, at 117–18.

380 *See* NUGENT, *supra* note 29, at 29–36 (categorizing state interests); *id.* at 129–33 (discussing diverging interests); *id.* at 152–53 (highlighting grants).

381 *See* Peabody & Nugent, *supra* note 70, at 52–53 (noting that intergovernmental lobby "involvement . . . is the norm when . . . Congress considers legislation with implications for state governments"); *cf.* NUGENT, *supra* note 29, at 130–31 (describing intergovernmental-lobby monitoring of *all* federal activity).

groups can effectively safeguard federalism in some instances.[382] And they do succeed, at least in part, fairly frequently.[383]

Comparing intergovernmental lobby organizations with private lobbies helps highlight problems that Super PACs create in this context: One obvious difference is that Super PACs and their donors spend enormous amounts of money to support candidates for election while intergovernmental groups do not participate appreciably in campaign finance. Additionally, Super PACs have significantly earlier access to officials—when they first become candidates—and may "lock up" loyalties before intergovernmental groups have a chance to press their interests, forcing intergovernmental groups into a weaker, reactive position.

The resource disparity is the most obvious problem. Lobbyists have long, sometimes infamously,[384] used campaign finance for persuasion; successful "[l]obbyists . . . have become prolific fundraisers and bundlers of campaign contributions for key legislators and party leaders."[385] Large Super PAC donors often already have a lobbying presence in Washington.[386] Prominent Super PACs are branching out into lobbying; prominent lobbying groups like the National Association of Realtors are forming Super PACs to increase their influence;[387] and significant informal connections, like staff crossovers, link

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382 *See* Hasen, *supra* note 243, at 218 (canvassing debate).

383 *See* CAMMISA, *supra* note 378, at 124–27 (describing successes); NUGENT, *supra* note 29, at 126–66; Peabody & Nugent, *supra* note 70, at 52.

384 *See, e.g.*, Susan Schmidt, James V. Grimaldi & R. Jeffrey Smith, *Investigating Abramoff—Special Report*, WASH. POST, http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html (last visited Mar. 8, 2014) (compiling stories detailing the infamy of lobbyists).

385 Hasen, *supra* note 243, at 222; *accord* BERRY, *supra* note 272, at 263 (describing "constituency influence" lobbying strategy); JEFFREY H. BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUND-RAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA 42–43 (2000) (describing lobbyists' bundling activities).

386 Briffault, *Super PACs*, *supra* note 8, at 1691–92 (noting that Super PAC donors engaged in lobbying on a variety of issues); Alexander Bolton, *Romney and Obama Super-PAC Backers Also Spent Big Dollars on Lobbying*, HILL (Feb. 25, 2012, 8:24 AM), http://thehill.com/business-a-lobbying/212547-donors-backing-romney-and-obama-super-pacs-spent-tens-of-thousands-on-lobbying.

387 *See* Eliza Newlin Carney, *Super PACs Make Move to Lobbying*, ROLL CALL (Nov. 30, 2012, 12:32 AM), http://www.rollcall.com/ news/super_pacs_make_move_to_lobbying-219080-1.html?zkPrintable=true; Dave Levinthal, *Super PACs Get New Use—As Lobbying Arms on Hill*, POLITICO (Sept. 25, 2012, 5:59 PM), http://dyn.politico.com/printstory.cfm?uuid=62E43429-D485-4EFE-86FF-89503869D0CD (quoting a public affairs professional as saying legislators' "ears are really going to perk up [if you say] . . . the words 'super PAC' . . . . It's such a big, scary thing—and can give you an extra edge of influence" (internal quotation marks omitted)).

Super PACs to lobbying groups.[388] And the deregulation of independent expenditures means that lobbyists representing major Super PACs, their donors, or those donors' industries can offer limitless electoral support to candidates.[389] Limitless private electoral spending in the new regime fosters strong patron–client relationships.[390] Direct campaign contributions by lobbyists are restricted—for example, they cannot act as conduits for third-party contributions.[391] The new capacity of Super PACs to spend without limit on independent electioneering provides a workaround.[392] Private lobbies also enjoy a competitive advantage because of their capacity to operate a "revolving door" between governmental service and the lucrative private lobbying job often waiting for cooperative officials when they leave office.[393] Officials will know the identities and interests of their major donors, not least because Super PAC ads can identify specific candidates and informal connections—former staffers, shared consultants, etc.—to link Super PACs to campaigns.[394] And, Super PACs employ professional strategists to maximize returns on electoral spending; thus, the officials they sponsor should be well positioned to serve their donors and are certain targets for those donors' lobbyists.[395] If it is clear to officials that a lobbyist represents Super PAC donors or otherwise has access to Super PAC resources, the lobbyist's message becomes substantially

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388 *See, e.g.*, Michael Beckel, *Lobbyists Like Pro-Obama Super PAC*, CTR. FOR PUB. INTEGRITY (July 25, 2012, 7:00 AM), http://www.publicintegrity.org/2012/07/25/10202/lobbyists-pro-obama-super-pac (noting private lobbyists that gave to a pro-Obama Super PAC); Lee Fang, *Corporate Lobbyists Run Almost Every Pro-Romney Super PAC*, NATION (Oct. 10, 2012, 1:38 PM), http://www.thenation.com/blog/170472/corporate-lobbyists-run-almost-every-pro-romney-super-pac#.

389 *See* Levinthal, *supra* note 387.

390 *See* Issacharoff, *supra* note 16, at 119–20.

391 *See, e.g.*, Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735, (codified in scattered sections of 2 U.S.C.) (instituting reporting requirements for "bundling" and banning lobbyist gifts to officials); Hasen, *supra* note 243, at 200–06 (canvassing current federal and state lobbying laws).

392 *See* McConnell v. FEC, 540 U.S. 93, 205 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

393 *See* Hasen, *supra* note 243, at 224.

394 *See, e.g.*, Briffault, *supra* note 8, at 1685–86 (discussing candidate interactions with Super PACs); Posner, *supra* note 6 (noting that candidates have incentives to discover who funds supportive Super PACs); *see also supra* notes 235–38 and accompanying text (emphasizing cross-staffing between campaigns and Super PACs as a potential means of coordination).

395 *See, e.g.*, Rick Cohen, *The Morphing of Super PAC Lobbying: From Election to Issue*, NONPROFIT Q. (Dec. 12, 2012), http://www.nonprofitquarterly.org/policysocial-context/21490-the-morphing-of-super-pac-lobbying-from-election-to-issue.html ("[H]alf of the [National Association of] Realtors' super PAC contributions went to two members of Congress . . . on the House Financial Services Committee. Guess where some of the Realtors' major policy priorities will be debated?").

more persuasive and failure to act on the lobbyist's request becomes substantially more threatening.[396]

Intergovernmental lobby groups cannot generate comparable financial influence over candidates. They do not invest appreciably in campaign finance.[397] As is characteristic of groups representing diffuse interests, the intergovernmental lobby's resources already are thinner than those of lobbyists for narrower private interests with unlimited financial backing: Their staffs are

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396 *See* David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1 ("The Supreme Court has handed a new weapon to lobbyists. If you vote wrong, a lobbyist can now tell any elected official that my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election."); Cohen, *supra* note 395 (reporting that the National Association of Realtors poured millions of dollars into the campaigns of supportive members of a House committee that was central to deciding issues relating to the group's legislative agenda).

397 A search of Internet-based compilations of campaign finance reports shows no contributions or expenditures falling within FEC reporting requirements for the National Governors Association, National Conference of State Legislatures, National Association of Attorneys General, or Noncommercial Stakeholders Group since 1991. *See* INFLUENCE EXPLORER, http://influenceexplorer.com (last visited Mar. 8, 2014) (showing no FEC reporting for any of these entities in results). The National League of Cities gave $4,750 to then-Senator Barack Obama's presidential campaign in 2008 and $1,750 to his 2012 campaign; it has also given small amounts to several democratic candidates for Congress or state office. *National League of Cities*, INFLUENCE EXPLORER, http://influenceexplorer.com/organization/national-league-of-cities (use the "Currently viewing National League of Cities from" drop-down menu to select the appropriate date range; select "2007–2008," "2009–2010," and "2011–2012," respectively) (last visited Mar. 8, 2014). The U.S. Conference of Mayors made similar *de minimis* contributions to one or a few candidates some years. *See U.S. Conference of Mayors*, INFLUENCE EXPLORER, http://influenceexplorer.com/organization/us-conference-of-mayors (use the "Currently viewing US Conference of Mayors from" drop-down menu to select the appropriate date range; select "2007–2008" and "2011–2012," respectively) (last visited Mar. 8, 2014) (revealing that U.S. Conference of Mayors made $250 contributions to Barack Obama in both 2008 and 2012 and a $5000 contribution to William Tong's Senate campaign in 2012). The National Association of Counties has engaged primarily in similar *de minimis* contributions scattered through various election cycles, but gave roughly $74,000 in the 2000 election cycle—a large amount compared to other intergovernmental lobby contributions—and distributed about sixty percent to Republican and forty percent to Democratic committees. *See National Association of Counties*, INFLUENCE EXPLORER, http://influenceexplorer.com/organization/national-assn-of-counties/4c05fbcec4f34f0781058ee6e4ad550c?cycle=2000 (last visited Mar. 8, 2014). These appear to have been soft-money committees. Nor does Nugent list campaign spending as a function of the primary groups. *See* NUGENT, *supra* note 29, at 122–38. Intergovernmental lobby groups that did make contributions frequently selected candidates without regard to party affiliation, as most contributed to both Republican and Democratic candidates. One exception not important here is that certain partisan organizations composed of state officials—most prominently the Republican and Democratic Governors' Associations—participate in financing *state* election activity. *See* Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under* Buckley*'s Major Purpose Test?*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 489 (2012) ("Between October 4, 2002 and December 31, 2010 . . . the [Democratic and Republican] Governors Associations participated in gubernatorial elections in forty-eight of the fifty states, and spent nearly half a billion dollars." (footnote omitted)). Although they are occasionally lumped in with the intergovernmental lobby, these groups are more like party committees susceptible to displacement by Super PACs. *See supra* Part III.B.

small and overloaded with monitoring, research, and other duties.[398] Intergovernmental lobby group officials can offer other forms of electoral support, including endorsements and access to local organizations—indeed, federal candidates often *are* former state officials likely familiar with these groups.[399] While this may substitute for some monetary support—indeed may be necessary regardless of a candidate's financial position—the expense of campaigns, and especially television ads, along with Super PACs' increasing capacity to provide ground-level organizational support suggests that candidates will value Super PAC support more than that of the intergovernmental groups.[400] Of course, money is not lobbyists' only path to influence: Direct cash-for-votes exchanges are rare;[401] instead, lobbyists use campaign money to "reinforce established connections" and cement "long-term relationships and friendships" that will serve clients' interests over time.[402] Connections may be more important to persuasion than other lobbying tools (e.g., providing support for officials' existing positions);[403] and intergovernmental organizations, composed of well-connected state officials, have an advantage in this regard.[404] But private interests' new freedom to commit limitless resources to forming early, strong patron–client relationships seems destined to diminish this advantage and increase the cost of influence for opposition groups.

This is problematic if Super PACs' interests conflict with those of intergovernmental lobby groups. Interest convergence is possible, but these groups' core objectives are incompatible in many cases. Private interests and state governments will clash over some federal policies—for example, as I

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398 *See* FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 11–12 (2009); NUGENT, *supra* note 29, at 128–42; Hasen, *supra* note 243, at 227–28. *See generally* OLSON, COLLECTIVE ACTION, *supra* note 139.

399 *See supra* notes 341–46 and accompanying text.

400 *See generally* DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952–2000 (3d ed. 2001) (discussing the importance and expense of advertising in campaigns).

401 *See* Hasen, *supra* note 243, at 217–18.

402 ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT 297 (2009) (quoting lobbyist Gerry Cassidy) (internal quotation mark omitted); *see* TASK FORCE ON FED. LOBBYING LAWS, ABA, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS 20 (2011), *available at* http://www.american.edu/spa/ccps/upload/lobbying_task_force_report _010311.pdf (describing lobbyists and officials in a "self-reinforcing cycle of mutual financial dependency"); Hasen, *supra* note 243, at 219–21 (stating that lobbyists create a "culture of reciprocity").

403 *See* Hasen, *supra* note 243, at 224 (arguing that, in lobbying, "who you know is more important than what you know").

404 *Cf.* NUGENT, *supra* note 29, at 144–45 (noting that intergovernmental-lobby groups' stature comes in part from members who are elected state officials).

mentioned, private-interest requests for centralization or deregulation may conflict with states' interest in continuing regulatory power even where the states want direct *federal* regulation of a subject replaced by collaborative regimes or increased *state* regulatory discretion.[405] Intergovernmental-lobby influence declined in the 1980s in part because "the Reagan Administration tried to radically reorient the federal domestic role"[406] by shrinking it—an objective shared by many contemporary Super PAC megadonors.[407] Administration officials viewed intergovernmental groups as "self-serving supplicants at the public trough, driving up federal costs in order to enhance their own influence" and thus cut their funding and access as part of a general strategy to roll back federal activity.[408] The relevant interests have not changed much; interests pushing centralizing or deregulatory agendas may be hostile to intergovernmental lobbying groups today.

While it is rarely zero-sum, interest groups may displace one another. Officials do not have unlimited capacity to respond to requests—"given finite quantities of elected officials' and staff's time, there is a declining marginal utility of lobbying."[409] There is also a finite number of proposals on which a legislator, say, will vote and only two possible actions—"yes" or "no." Where opposing interest groups have invested in access to the legislator, and she cannot serve them all through compromise, she must choose which interests to satisfy.[410] Public choice theory suggests that she will favor the group that can do more to affect her chances of reelection;[411] the lobbying literature suggests that the most successful lobbyists are those who channel the best information and most significant campaign resources to officials.[412] When interest groups clash, then, Super PACs and their lobbyists are on the right side of an

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405 *See* NUGENT, *supra* note 29, at 36–40 (noting that states share "[l]egalistic" interests in "be[ing] recognized as the authoritative decisionmakers . . . without the threat" of preemption); *supra* Part III.A.

406 Hays, *supra* note 377, at 1081.

407 *See, e.g.*, Fredreka Schouten, Gregory Korte & Christopher Schnaars, *25% of Super PAC Money Coming from Just 5 Rich Donors*, USA TODAY, http://usatoday30.usatoday.com/ news/politics/story/2012-02-21/super-pac-donors/53196658/1 (last updated Feb. 22, 2012, 10:15 AM) (noting that major donors "put their resources behind their vision of the appropriate relationship between the government and the private sector," namely "low taxes, small government, and personal responsibility" (internal quotation marks omitted)).

408 Hays, *supra* note 377, at 1081–82.

409 Hasen, *supra* note 243, at 229 (arguing that lobbying wastes resources).

410 *Cf. id.* (noting the "finite quantities of elected officials' and staff's time" as a limit on the potential efficacy of lobbying).

411 *See generally* sources cited *supra* notes 139, 291.

412 *See* GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 10–15 (2001); Hasen, *supra* note 243, at 216–25. *See generally* Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69 (2006) (modeling lobbying as a form of legislative subsidy).

expanding resource gap—"those who help out the most are likely to get the greatest access. It is a natural instinct to help someone who has helped you."[413]

Super PACs also enjoy a timing advantage. Their campaign finance activities can begin cultivating influence early in campaigns; thus Super PACs may attempt to "lock up" candidates before they are elected by forming, or beginning to form, long-term patron–client relationships that can be exploited later by lobbyists.[414] Super PAC resources make such an objective plausible. Such relationships make it difficult for opposing interests to persuade officials later on to vote against early patrons' interests. And, Super PACs and their donors profit from the capacity to contact officials through Super PACs during campaigns and again through lobbyists later—repeated contacts enhance influence. Thus, Congress has recognized the increased risk of corruption arising from campaign contributions from government contractors and lobbyists—groups that already have frequent postelection contacts with officials.[415] Substantial early financial influence empowers Super PACs to shape candidates' policy agendas, which are often formed early in campaigns and made "sticky" by the costs of breaking campaign promises.[416] Agenda change after election, when intergovernmental groups have their greatest access, may impose costs that conflict with officials' interest in reelection.[417] This is a powerful advantage. Legislative inertia makes it difficult to force action on issues other than those already on a legislator's or the public's

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413 Hasen, *supra* note 243, at 221.

414 *See* Issacharoff, *supra* note 16, at 127–28 (arguing that one important form of corruption is the formation of long-term "patron–client relationship[s]" between officials and donors, the "focus of [which] is not the enrichment of an individual politician but continued officeholding on the condition that 'party politicians distribute public jobs or special favors in exchange for electoral support'"). The value of durable patron–client relationships to interest groups suggests that they will rationally seek to establish them as quickly and for as low a price as possible.

415 *See* Hatch Act Amendments of 1940, Pub. L. No. 76-753, § 5(a), 54 Stat. 767, 772 (repealed 1976) (precluding contractor contributions); Issacharoff, *supra* note 16, at 138–42. FECA permits PAC contributions but retains the rest of the Hatch Act's prohibition. *See* 2 U.S.C. § 441c(b) (2012).

416 *See* William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators*, 74 VA. L. REV. 373, 374 (1988) (noting the importance of agenda-setting); *see also* Yasushi Asako, Partially Binding Platforms: Campaign Promises vis-à-vis Cost of Betrayal 2 (Nov. 20, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226229&download=yes ("Politicians decide policy on the basis of their platforms and the perceived cost of betrayal, and hence, platforms should be considered as partial commitment devices to restrict a candidate's future policy choice.").

417 *Cf.* Yasushi Asako, Campaign Promises as an Imperfect Signal: How Does an Extreme Candidate Win Against a Moderate One? 2 (June 29, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227206 (modeling postelection policy choices on the assumption that breaking campaign promises is costly).

agenda; controlling agendas helps interest groups either overcome that inertia or bury proposals that they oppose.[418] Moreover, political advertising—a Super PAC specialty—can raise an issue's public salience to the point that viable candidates must take a position on it.[419] And, Super PACs may capture agenda setters—committee chairs, the congressional leadership, legislators positioned at key vetogates, etc.—who can control Congress's agenda by, among other things, sequencing proposals or otherwise leveraging vote cycles and strategic voting to maximize their preferences.[420] The intergovernmental lobby has at times shaped the national agenda—placing UMRA on Congress's agenda and shaping welfare reform in 1995, for example—but agenda space is limited and will be more difficult to secure when competing with Super PACs and their lobbyists.[421] Moreover, the intergovernmental lobby has succeeded in this regard primarily by issuing *bipartisan* proposals that were already possible under only limited circumstances.[422] Super PACs' tendency to increase polarization may exacerbate this and other collective action problems that the intergovernmental lobby and other public interest groups face.[423]

These dynamics are problematic: lobbyists rarely convince officials to change their preexisting views but instead succeed by supporting officials' existing positions or by persuading them on issues of low public salience about which the officials are unlikely to have a firm position.[424] Federalism is one such issue,[425] and that is doubly damaging here—it makes it easier for private interests to shape candidates' views and for the candidate, once elected, to service those interests without political cost.[426] Interests with early access to

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418 *See* Riker & Weingast, *supra* note 416, at 389–94.

419 *See* James N. Druckman et al., *Candidate Strategies to Prime Issues and Image*, 66 J. POL. 1180, 1181 (2004); Walker Wilson, *supra* note 245, at 683–84 (discussing the use of political ads to increase issue salience).

420 *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1183 (2001) ("[L]egislative choices . . . are driven by agenda-setters."). *See generally* Riker & Weingast, *supra* note 416 (analyzing agenda-setters' power).

421 *See* NUGENT, *supra* note 29, at 143–44 (describing lobbyists' influence on welfare reform); Garrett, *supra* note 121, at 1498 (discussing UMRA).

422 *See* NUGENT, *supra* note 29, at 129–34 (arguing that success is usually bipartisan, but bipartisan consensus is rare). *See generally* HAIDER, *supra* note 378 (discussing the intergovernmental lobby's reliance on "consolidation" to influence the national agenda); PAUL L. POSNER, THE POLITICS OF UNFUNDED MANDATES: WHITHER FEDERALISM? (1998) (noting that subnational governments face collective action problems generally).

423 *See supra* note 398 and accompanying text.

424 *See* Hasen, *supra* note 243, at 220 & n.172.

425 *See generally* Devins, *supra* note 95, at 131 (arguing that "the national political process does not value structural federalism," at least in part, because "[n]o one really cares about federalism").

426 *See* sources cited *supra* note 291.

the candidate and significant influence over his or her agenda, then, have the best opportunity to shape his or her views on federalism. Accordingly, groups with interests in centralization or deregulation may persuade a candidate to adopt a position contrary to state autonomy on many subjects.[427] That view is what intergovernmental lobbyists must try to change—a task at which lobbyists often fail.[428] While the low public salience of federalism increases their likelihood of success, it does not inherently favor any particular interest group. Intergovernmental lobbyists' resource disadvantages make these contests uneven.

A third concern is that the increasing involvement of powerful private interests in state elections might result in the capture of state officials that give intergovernmental organizations their influence in Washington.[429] In addition to their incentives to seek Super PAC support for *state* campaigns, state officials also may have incentives to avoid alienating potential backers for future federal campaigns if they have federal aspirations.[430] This dynamic magnifies the growing concern that state officials increasingly prioritize national issues over their states' institutional interests, perhaps in part due to the general nationalization of politics and public agendas.[431] This, of course, undermines any political safeguard that depends on state officials' tendency to prioritize and thus fight for state interests.

Several other problems for intergovernmental groups are created or exacerbated by *Citizens United*. First, captured officials have incentives to increase governmental complexity to camouflage their patron service. This is problematic insofar as all political safeguards depend on a degree of transparency in federal policymaking sufficient to alert state-interest advocates when to act.[432] It particularly complicates the intergovernmental lobby's already difficult and costly task of monitoring government activity for

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427 *See supra* Part III.A.

428 *See* Hasen, *supra* note 243, at 227–28.

429 *See* NUGENT, *supra* note 29, at 136 (suggesting that state officials may themselves be influential lobbyists).

430 Thus it would not be surprising to see some governors resist taking a position, through the NGA, on proposals with serious federalism implications that also touch on controversial issues like gun control, gay marriage, physician-assisted suicide, and others that might alienate Super PAC donors. *Cf.* Young, *supra* note 289, at 1278 (noting the federalism implications of public-policy debates in these and other controversial areas).

431 *See* Young, *supra* note 23, at 84–85; *cf.* Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (noting the tendency of state bureaucrats in cooperative regimes to identify with their federal analogues more readily than state-elected counterparts).

432 *See* OLSON, NATIONS, *supra* note 139, at 70.

incursions on state autonomy.[433] Second, intergovernmental organizations "are long-term, repeat players in the legislative process" with incentives to sustain influence over federal offices regardless of their occupants' party or views;[434] thus, they lack outside groups' freedom to *punish* federal officials who act against their interests.[435] States may threaten to withhold implementation resources, but federal officials likely will perceive threats of shifting Super PAC support as more immediate and consequential.[436] Third, increasing private lobbying power reinforces the status quo bias in federal policymaking: Lobbyists fare best at resisting new legislation, which merely requires persuading a few members controlling a vetogate and not a majority.[437] This may coincidentally favor federalism where it stalls preemptive proposals and the like, but it will also favor wealthy interests defending a centralized or deregulated status quo and frustrate states seeking augmented regulatory authority through devolution or new cooperative regimes.[438] Finally, the growth of Super PACs may sharpen the self-reinforcing selection effects of campaign-finance doctrine—Super PACs may decide which candidates to support based on their appeal to outside groups.[439] If megadonors select candidates committed to centralization or deregulation and, thus, perhaps hostile to continuing state regulatory power, they will further impede intergovernmental-lobby efforts to win departures from the status quo. In the longer run, outside groups will select candidates with narrow commitments compatible with the groups' objectives. Further expansion of outside-group power, therefore, may eventually force states and their advocates to face a generally unreceptive federal government.[440]

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433 *See* NUGENT, *supra* note 29, at 126–31; Peabody & Nugent, *supra* note 70, at 54.

434 Peabody & Nugent, *supra* note 117, at 54. Some private interests and professional lobbyists are also repeat players. Hasen, *supra* note 243, at 219. For this reason, bald campaign-finance threats seem more likely to come from ideological Super PACs than established lobbying firms.

435 Corporations are similar: They gave large soft-money donations to both parties to secure access to whoever was elected, but have avoided political spending through partisan outside groups. *See* McConnell v. FEC, 540 U.S. 93, 124–25 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010); Briffault, *supra* note 214, at 963; *see also* Imus, *supra* note 2 (noting that corporate spending was minor in 2012).

436 *See* sources cited *supra* notes 388–89.

437 *See* ESKRIDGE ET AL., *supra* note 270, at 70–75 (describing vetogates).

438 *See* Hasen, *supra* note 243, at 227 & n.215 ("[A] status quo bias favors wealthy interests, who have already won in the past.").

439 *See* Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 954–55 (2005) (providing a theoretical overview).

440 *See, e.g.*, Jeff Zeleny, *Top Donors to Republicans Seek More Say in Senate Races*, N.Y. TIMES, Feb. 2, 2013, http://www.nytimes.com/2013/02/03/us/politics/top-gop-donors-seek-greater-say-in-senate-races.html (reporting that Republican operatives created a new Super PAC to screen primary candidates).

These harms may be reduced if states and their lobbyists have a form of influence over federal policy qualitatively different from that of private interests. The states' role in implementing federal policy—the "power of the servant," often crucial because of limited federal resources—may give states exactly that.[441] States frequently leverage this influence to secure concessions from federal regulators concerning the implementation of existing programs;[442] they also have used it at the legislative phase—state resistance to the federal REAL ID Act, for example, which would require significant state implementation, has stalled the legislation and may force changes to the basic program.[443] But this power is not limitless: States are not always free to walk away from the bargaining table. State implementation is often a condition of federal funding, and in some instances the money proves an irresistible carrot.[444] That states rarely decline federal funds suggests that Congress has become skilled at making "correct estimate[s] of the nonfederal governments' opportunity costs of providing the requested services";[445] so, too, scholars and now the Court have recognized that spending conditions may be coercive in view of the states' budgetary circumstances.[446] But not every state needs every federal dollar so much that states may never credibly threaten to withhold

441 *See generally* Gerken, *supra* note 30, at 11 (arguing to reorient federalism around state and local institutions and "develop an account of the power of the servant to compete with our existing account of the power of the sovereign").

442 *See* NUGENT, *supra* note 29, at 144 (detailing intergovernmental lobbyists exploiting federal dependence on state implementation to influence the substance of the Safe Drinking Water Act).

443 *See generally* Mitchel N. Herian, *The National Governors Association and Opposition to Homeland Security Policy*, 10 J. INST. JUST. & INT'L STUD. 59 (2010) (discussing the NGA and its allies' opposition to the REAL ID Act).

444 *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 862 (1998); *see also* Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1289–95 (2013) (examining the unconstitutional conditions doctrine to clarify the distinction between coercion- and compulsion-based rationales for invalidating spending conditions).

445 Hills, *supra* note 444, at 862; *cf.* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 100–01 (showing that conditional grants are not inevitably coercive).

446 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605, 2633 (2012) (holding that the Patient Protection and Affordable Care Act's Medicaid expansion provisions, which threatened states with an aggregate loss of $233 billion in federal funding, or over ten percent of state budgets, was unconstitutionally coercive because states had no reasonable choice to refuse to adopt the expanded Medicaid coverage conditions in the face of such a large financial penalty for refusing to do so); *see also id.* at 2644; South Dakota v. Dole, 483 U.S. 203, 211 (1987) (announcing the unconstitutional-conditions doctrine). *See generally* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) (canvassing academic views); Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875 (2008) (analyzing state decisions to accept federal funds).

implementation resources.[447] Intergovernmental lobby groups are often vehicles for this form of state influence; thus, to the extent that the post–*Citizens United* landscape diminishes the power of groups like the NGA, states' "power of the servant" may correspondingly decline.[448]

CONCLUSION

The states have adapted to changing political environments by developing various channels of influence in Congress, federal agencies, political parties, and ad hoc negotiations.[449] The sophistication of state governments as political operators seems a crucial feature of the system of nonjudicial federalism safeguards. However, states' influence is threatened by the rise of equally sophisticated, better funded, and—because of their capacity for unlimited spending—more powerful political vehicles for private interest-group influence. These interests will have most of the political power but will hardly ever advocate federalism for its own sake. When they do fight for state autonomy they will most likely do so to advance their own substantive policy goals—goals which, if suddenly better served by nationalization or deregulation, will dictate abandoning federalism. And often they will have strong incentives to straightforwardly oppose state governments' attempts to maintain or increase their regulatory autonomy. Because they are interconnected and all depend to some degree on state influence, this affects every form of nonjudicial safeguard.[450] For example, weakening the parties enables easier private-interest capture of officials which, in turn, pushes states' interests down the list of priorities, hamstringing intergovernmental lobbying efforts and other forms of state bargaining.

Super PACs do not directly undermine all federalism safeguards—Clark's inertia and Gerken's "power of the servant" may survive relatively intact.[451] But there are reasons to worry: Ideological interest groups that command large slates of officials—including, perhaps, important vetogate-holders—may

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447 *See* Hills, *supra* note 445, at 861–63.

448 *See* NUGENT, *supra* note 29, at 134; Hills, *supra* note 445, at 866.

449 *See* Robert A. Schapiro, Book Review, 7 PERSP. ON POL. 968, 969 (2009) (reviewing NUGENT, *supra* note 29) (noting adaptations, including lobbying); *see also* Bednar, *supra* note 36, at 270 (describing federalism as a complex adaptive system); Issacharoff & Karlan, *supra* note 10, at 1705 (emphasizing political actors' adaptability); Ryan, *supra* note 35, at 7, 8–9 (noting that across contexts, "public actors work bilaterally across state-federal lines to safeguard federalism by negotiating the terms of governance").

450 *See supra* notes 130–34 and accompanying text (discussing interconnections).

451 *See generally* Clark, *supra* note 31; Gerken, *supra* note 30.

successfully press measures that could not pass under normal circumstances.[452] A narrow ideological agenda makes it easier to discipline officials; and discipline is one solution to congressional inertia. As for the power of the servant, states' leverage as federal policy implementers may not be directly diminished by Super PAC politics. But the system's safeguards are interconnected—if states rely on intergovernmental lobbying groups to assert their implementation leverage, then the practical value of that leverage will diminish with the influence of those groups. And the power's value for state autonomy necessarily shrinks when decoupled from mechanisms through which states shape, *ex ante*, the federal programs that they will implement. Both inertia and the power of the servant are *ex post* safeguards—if the *ex ante* mechanisms stop working, states will meet federal intrusion primarily from a reactive posture—running interference in Congress or negotiating with federal agencies over implementation of a regime they had little hand in shaping—that seems on balance less promising for protecting state prerogatives. Moreover, as outside groups increasingly turn their attention to state elections, there is also increasing risk that state governments themselves may be captured and turned against their own institutional interests. The post–*Citizens United* system, then, seems on balance less protective of state autonomy.

The loss of state influence across political contexts will affect constitutional construction. Excluding states from the process of constitutional development runs counter to the idea of federalism—which suggests continuing state government influence on at least nonmandatory structural developments—by diminishing the extent to which the negotiated set of constructive federalism norms is a product of state, as well as federal, inputs. Constitutional construction also has instrumental significance insofar as it creates guidelines for future government interactions that increase the stability and predictability of the structure by precluding large deviations from established practice. Excluding the states from parts of this constructive process diminishes their capacity for self-defense in a broad sense.

We need new federalism theory and doctrine that accounts for these new political realities to recalibrate federalism theory's normative programs. More judicial intervention on behalf of states may be necessary, but other remedies are worth considering. We might, for example, fold federalism considerations into campaign finance jurisprudence—not necessarily as decisive, all-trumping

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[452] *See supra* notes 341–74 and accompanying text.

constitutional requirements, but perhaps as defeasible reasons for decision.[453] Conventional justifications for campaign finance restrictions were increasingly criticized even before the Supreme Court rejected most of them in *Citizens United*.[454] Alternative justifications—such as preventing long-term incumbent clientelism, increasing voter and small-donor participation, and increasing the strength of political parties—have been floated.[455] Highlighting the extent to which doctrinal devices like the contribution/expenditure distinction work to undermine federalism, perhaps alone or coupled with standard anticorruption interests, should justify a more balanced constitutional standard—one that, perhaps, would reinforce federalism's political safeguards by permitting some new limitations on outside spending, greater latitude for candidates and parties on small-donor development, a more exacting test for candidate coordination with outside groups, new limits on competition with political parties, or something else. Such doctrinal change would not be incoherent—reinforcing federalism advances many of the same basic democratic values that undergird campaign finance doctrine. Legislative initiatives that strengthen parties—particularly state parties—or that level the playing field for intergovernmental lobby groups all would help to offset the power of unregulated outside spending.[456]

Understanding the shape of the problem is crucial to formulating workable solutions. Campaign finance scholarship has long focused on a narrow set of values to the exclusion of other considerations that could broaden its normative scope. And federalism theory has for too long relied upon an idealized model of the political process that bears little resemblance to reality. It is obvious already that *Citizens United* and its progeny have caused a tectonic shift in our political system. The full consequences remain to be seen, but they are materializing with surprising speed. Super PACs collected and spent nearly $2 billion within *the first two election cycles* after their legalization. But the dramatic rate of change must not distract us from the longer view—and the long-term consequences of unregulated outside electoral spending for the

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453 *See* Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 817–22 (2012); *see also* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 92–95 (2004) (arguing that the formulation of constitutional doctrine may be legitimately influenced by pragmatic considerations, such as institutional capacity, interbranch friction, adjudicatory manageability, and others).

454 *See generally, e.g.*, Issacharoff & Karlan, *supra* note 10 (arguing that political money is a hydraulic force such that reforms are unlikely to eliminate the risk of corruption); Krasno & Sorauf, *supra* note 291, at 130–39 (arguing that "corruption" is too malleable to support regulation).

455 *See generally, e.g.*, Overton, *supra* note 23 (arguing for states' interest in participation).

456 *See generally, e.g.*, Gerken, *supra* note 43 (proposing various leveling-up and leveling-down strategies to even the lobbyist/non-lobbyist playing field); Hasen, *supra* note 243 (discussing lobbying).

fundamental constitutional structure have not, so far, been the focus. I draw attention to them here not only to ensure that they are not missed in the frenzy to emphasize the straightforward money-in-politics effects on democratic values, but also to emphasize the significance of these subtler but potentially more significant dynamics. To more fully address persistent normative puzzles—why states persist despite weak judicial protection, how courts can improve federalism doctrine, how federalism benefits society, how the Constitution entrenches the structure of government, and so forth—we must incorporate complex and often messy truths about states' political circumstances into our theories.